82-1404

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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

EDWARD ROBERT NIGRO, JR.,

(Real Party In Interest), Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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February 2, 1983

QUESTIONS PRESENTED

1. WHETHER STATUTORY IMMUNITY, 18 U.S.C §6002, IS COEXTENSIVE WITH AND COMPREHENSIVE AS THE CONSTITUTIONAL FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHERE PETITIONER FACES A REAL AND SUBSTANTIAL THREAT OF FOREIGN PROSECUTION.

2. WHETHER GRAND JURY SECRECY AS REQUIRED BY RULE 6 (e), FEDERAL RULES OF CRIMINAL PROCEDURE CAN SUPPLANT THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY NEGATING A REAL AND SUBSTANTIAL FEAR THAT SAID TESTIMONY WILL BECOME AVAILABLE TO FOREIGN JURISDICTION.

3. WHETHER 28 U.S.C. §1826 (a) AND DUE PROCESS REQUIRE A RECALCITRANT GRAND JURY WITNESS A MEANINGFUL OPPORTUNITY TO SHOW "JUST CAUSE" FOR REFUSING TO OBEY A COURT ORDER TO TESTIFY.

4. WHETHER THE GOVERNMENT CAN USE STATEMENTS ELICITED PURSUANT TO PLEA NEGOTIATIONS AND RULE 11 (e) (6), FEDERAL RULES OF CRIMINAL PROCEDURE WHERE PETITIONER ENTERED A PLEA OF GUILTY TO CHARGES INDEPENDANT OF THE NEGOTIATIONS AND THE

NEGOTIATIONS THEMSELVES DID NOT RESULT IN ANY AGREEMENT

5. WHETHER THE GOVERNMENT COMPLIED WITH THE "SHOWING REQUIREMENT" OF 18 U.S.C. §3504 (a)(1) BY MAKING AN UNVERIFIED, HEARSAY STATEMENT REGARDING THE LEGALITY OF ELECTRONIC SURVEILLANCE AFTER THE EXISTENCE OF JUDICIALLY UNAUTHORIZED SURVEILLANCE IS ADMITTED

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Constutitional Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ of Certiorari	10
Conclusion	24
Appendix 1 (Opinion of the Court of Appeals)	
Appendix 2 (Memorandum Opinion and Order of the District Court)	
Appendix 3 (Text of Statutes)	

CITATIONS

Brady v. Maryland, 373 U.S. 83 (1963)	6, 15
In Re Baird, 668 F. 2d. 432 (8th Cir., 1982)(cert. denied S. Court 2255 [1982])	13
In Re Cardassi, 351 F. Sup. 1080 (D. Conn., 1972)	14
In Re Flannigan, No 82-6058 (2nd Cir., October 13, 1982)	13, 14
In Re Grand Jury Investigation 545 F. 2d. 385 (3rd Cir., 1972)	18

In Re Grand Jury Investigation, 610 F. 2d. 202 (5th Cir., 1980) 15

In Re Grand Jury Proceedings, 463 F. 2d. 226 (5th Cir., 1974) 23

In Re Grand Jury Proceedings, 491 F. 2d. 42 (D.C. Cir., 1974) 18

In Re Grand Jury Subpoenas, 573 F. 2d. 939 (reversed en banc 584 F. 2d. 1366 [6th Cirl, 1978]) 15

In Re Lemieux, 597 F. 2d. 1166, 1167-68 (9th Cir., 1979) 13, 15

In Re Lochiatto, 497 F. 2d. 803 (lst Cir., 1974) 18

In Re Mintzer, 511 F. 2d. 471 (lst Cir., 1974) 23

In Re Parker, 411 F. 2d. 1067 (10th Cir., 1969)(vacated as moot sub. nom., Parker v. United States, 397 U.S. 96 [1970]) 17

In Re Quinn, 525 F. 2d. 222 (lst Cir., 1975) 23

In Re Sadin, 509 F. 2d. 1252 (2nd. Cir., 1975) 18

In Re Vigil, 524 F. 2d. 209 (10th Cir., 1975) 18, 23

Mishima v. United States, 507 F. Sup. 131 (D. Alaska 1981) 13

Murphy v. Water Front Commission of New York Habor, 378 U.S. 52 (1964) 11

Society International v. Rogers, 357 U.S. 197, 211 (1958) 11

United States v. Alter, 482 F. 2d. 1016 (9th Cir., 1973) 18, 23

United States v. Brummitt, 665 F. 2d. 521, 525-26 (5th Cir., 1981) (cert. denied 102 S. Court 2244, [1982]) 13

United States v. Bowe, 491 F. 2d. 970 (8th Cir., 1974) 18

United States v. Fitch, 472 F. 2d. 458 (9th Cri., 1973) 23

United States v. Gelband, 408 U.S. 41 (1972) 18, 22

United States v. Murdock, 284 U.S. 141, 149 (1931) 11

United States v. Stevens, 510 F. 2d. 1101 (5th Cir., 1975) 23

United States v. Trucis, 89 F.R.D. 671 (E.D. Penn, 1981) 13

United States v. Yanagita, 552 F. 2d. 840 (2nd Cir., 1977) 13

Zicarelli v. New Jersey Investigating Commission, 406 U.S. 472, 478 (1972) 11, 12, 13, 17

RULES

Rule 6, Federal Rules of Criminal Procedure, 3, 4, 8, 12, 13, 14, 16

Rule 11 (e)(6), Federal Rules of Criminal Procedure, 3, 4, 5, 10, 20, 21

STATUTES

18 U.S.C. §3500 (e)(3) 15

18 U.S.C. §3504 (a)(1) 3, 4, 10, 22, 23

18 U.S.C. §6001 6

18 U.S.C §6002 2, 4, 8

28 U.S.C. §1254 2

28 U.S.C. §1826 (a)(1) 3, 4, 7, 17, 18 20, 22

AMENDMENTS

Fifth Amendment, United States Constitution 2, 4, 7, 8, 10, 14, 15, 16 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

EDWARD ROBERT NIGRO, JR., Petitioner

vs

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIRORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, EDWARD ROBERT NIGRO JR., by and through undersiged counsel, John D. Kaufmann, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 16, 1982.

I

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix 1 attached hereto. A Memorandum Opinion and Order was rendered by the District Court of Colorado on November 10, 1982. The Memorandum Opinion has not yet been reported and a copy of said opinion appears in Appendix 2 attached hereto.

II

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on December 16, 1982. A timely petition for rehearing or in the alternative a petition for rehearing en banc was denied on January 11, 1983. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdction is invoked under 28 U.S.C. §1254 (1).

III

QUESTIONS PRESENTED

1. Whether statutory immunity, 18 U.S.C. §6002, is coextensive with and comprehensive as the Constitutional Fifth Amendment privilege against self-incrimination where Petitioner faces a real and substantial threat of foreign

prosecution.

2. Whether Grand Jury secrecy as required by Rule 6 (e), Federal Rules of Criminal Procedure can supplant the constitutional privilege against self-incrimination by negating a real and substantial fear that said testimony will become available to foreign jurisdictions.

3. Whether 28 U.S.C. §1826 (a) and due process requires a recalcitrant Grand Jury Witness a meaningful opportunity to show "just cause" for refusing to obey a court order to testify.

4. Whether the government can use statements elicited pursuant to plea negotiations and Rule 11 (e)(6), Federal Rules of Criminal Procedure where Petitioner entered a plea of guilty to charges independant of the negotiations and the negotiations themselves did not result in any agreement.

5. Whether the government complied with the "showing requirement" of 18 U.S.C §3504 (a)(1) by making an unverified, hearsay statement regarding the legality of electronic surveillance after the existence of judicially unauthorized surveillance is admitted.

IV

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution.

2. 18 U.S.C. §6002 - Immunity.

3. 28 U.S.C. §1826 - Recalcitrant Witness.

4. 18 U.S.C. §3504 (a)(1) - Litigation concerning sources of evidence.

5. Federal Rules of Criminal Procedure, Rule 6 (e) - Rule of Secrecy and Exceptions.

6. Federal Rules of Criminal Procedure, Rule 11 (e)(6) - Plea Negotiations.

(Text of statutes found in Appendix 3.)

V

STATEMENT OF THE CASE

The Petitioner is a federal inmate presently incarcerated at the Federal Correctional Institute, Talladega, Alabama. Prior to the subject case, the Appellant had been convicted of multiple counts in the Western District of Tennesse and the District of Arizona. All convictions concern marijuana importation schemes and the Petitioner was eventually sentenced to terms ranging up to fifteen (15) years.

In October and November of 1981, after his Tennessee conviction, but prior to his Arizona change of plea, it became apparent that Petitioner would face additional charges arising out of the District of Colorado. A discussion was held in Arizona between officials from the District of Colorado and MR. NIGRO. The discussion was held under the prophylactic protection of Rule 11 (e)(6), Federal Rules of Criminal Procedure. The conversations concerned matters presently pending before a Federal Grand Jury sitting in the District of Colorado. All parties agree that the discussions failed to result in an agreement. Independant of these discussions, the Petitioner plead guilty to charges alleged in the District of Arizona indictment.

By July of 1982, the government elected not to indict the Petitioner NIGRO. The government decided to use MR. NIGRO'S testimony in securing indictments and convictions for other target Defendants. Pursuant to that decision, the government issued a Writ of Habeas Corpus Ad Prosequendum and transported the Petitioner from Talladega, Alabama to Denver, Colorado.

Prior to being brought before the Grand Jury the Appellant filed numerous motions to quash the Petition for Writ of Habeas Corpus and to cppose any order attempting to compel testimony. The Petitioner was brought before the Grand Jury on July 27 and July 28, 1982. On all occasions, MR. NIGRO refused to testify citing and invoking a number of constitutional and statutory rights.

On July 28, 1982, the District Court granted the Petitioner statutory immunity pursuant to 18 U.S.C. §6001 et. seq. MR. NIGRO continued to refuse to testify citing the same statutory and constitutional privileges. A briefing schedule was set by the Court, calling for September 27, 1982, as the last date for either party to seek additional relief. By September 20, 1982, the Appellant had filed six (6) motions directed at quashing the Writ of Habeas Corpus Ad Prosequendum, one (1) motion for discovery pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and a Petition for Restraining Order. The Petitioner requested evidenciary hearings and informed the District Court of his intent to subpoena out of state witnesses.

On Wednesday, September 22, 1982,

the District Court advised Appellant at 4:45 p.m. by telephone that a hearing would be held on Friday, September 24, 1982 at 10:00 a.m. in the District of Colorado. The 10:00 a.m., September 24, 1982 hearing was delayed for forty-five (45) minutes. At the beginning of the hearing, the Court stated Appellant would have twenty (20) minutes to highlight and summarize his position on all matters. This Petitioner complains that due process and 18 U.S.C. §28-1826 (a) was violated by insufficinet notice and opportunity to be heard, This is specifically true in this case where time was not of the essence.

At the hearing, Petitioner presented to the District Court various claims relevant to this Petition for Certiorari. The first matter concerned the Petitioner's Fifth Amendment right against self-incrimination. The District Court held that MR. NIGRO:

> Refused to answer questions concerning illegal import and export of money between the United States and unnamed countries; illegal laundering of narcotic money inside and outside the territorial United States; illegal laundering of narcotic money through offshore corporations

> or banks; sources of money received from operations of narcotic operations.

The Petitioner maintained the statutory grant of immunity, 18 U.S.C. §6002, was not comprehensive as and coextensive with the constitutional grant against self-incrimination insofar as it could not grant immunity extraterritorially. The District Court held the Constitutional Fifth Amendment privilege applies only to restrain officials who act under laws of the United States:

> [T]hey (the constitution and Fifth Amendment) o not extend their protection to persons who are subject to prosecution by wholly unrelated governments abroad.

Additionally, the District Court found that MR. NIGRO was adequately protected by the provisions of Rule 6 (e), Federal Rules of Criminal Procedure, requiring that Grand Jury testimony be kept secret and, therefore, the Witness could not have a real and substantial fear of foreign prosecution.

The Tenth Circuit did not address the issue of whether a constitutional right existed, but did affirm the District Court's position that Rule 6 (e) adequately protected against a real

and substantial fear of foreign prosecution. No other claims were addressed by the Tenth Circuit. It affirmed, without comment, all other decisions of the District Court.

During the September 24, 1982 hearing, the government admitted that Petitioner's telephone conversations had been taped by the government prior to his arrest in March of 1981. The Petitioner claimed his surveillance was unlawful and resulted in questions being asked of Petitioner before the subject Grand Jury. The Assistant U.S. Attorney claimed the surveillance was done pursuant to the statutory "consent" exception to the warrant requirement. The Assistant U.S. Attorney making this claim was not associated with the admitted surveillance and was conveying information to the court from unknown sources. (Presumably another Assistant U.S. Attorney.) In its Memorandum Opinion, the District Court accepted the hearsay statement of the non-participating Assistant U.S. Attorney and denied Petitioner an additional hearing. In doing so, the District Court held by implication the hearsay statement complied with the "showing

requisites" of 18 U.S.C. §3504 (a)(1).

In regards to the plea negotiations the District Court found as follows:

> All parties now agree these discussions (regarding matters pending before the subject Grand Jury) were conducted pursuant to Rule 11 (e)(6), Federal Rules of Criminal Procedure. After these discussions failed to result in any agreement, MR. NIGRO proceeded to enter a guilty plea in the United States District Court for Arizona.

The Arizona case and the Colorado case were separate and distinct. The District Court held that the Arizona plea negated governmental assurances under 11 (e)(6) for the Colorado case and permitted the use of information received in those discussions to formulate questions before the subject Grand Jury.

VI

REASONS FOR GRANTING THE WRIT OF CERTIORARI

QUESTIONS 1 AND 2

A

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL STATUTORY AND CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

The issue whether the Fifth Amendment to the United States Constitution

applies to foreign prosecution has sporadically appeared before this court since 1931. C.F. United States v. Murdock, 284 U.S. 141, 149 (1931); C.F. Society International v. Rogers, 357 U.S. 197, 211 (1958); C.F. Murphy v. Water Front Commission of New York Habor, 378 U.S. 52 (1964); Zicarelli v. New Jersey Investigating Commission, 406 U.S. 472, 478 (1972). The specific issue was addressed in one (1) case, Zicarelli, supra. The court declined to specifically rule on the application of the constitutional right, holding instead that the Petitioner in Zicarelli had failed to establish prerequisites to determining whether the constitutional right did exist.

In Zicarelli, the court found two (2) prerequisites to determining the constitutional issue. The two (2) prong test requires a Witness to first make a prima facia showing that a real danger exists of being compelled to disclose information that might incriminate the Witness under foreign law and secondly, that a real and substantial danger of foreign prosecution exists. In Zicarelli, the Petitioner failed to show that the unanswered

questions required disclosure of extra-territorial crimes.

Based upon the findings of the District Court, Petitioner has met prong one (1) of the Zicarelli test. The Appellate Court avoided the constitutional issue by hold Rule 6 (e), Federal Rules of Criminal Procedure, prohibited the Petitioner from facing a "real and substantail danger of foreign prosecution based on his ordered testimony". The Court further stated that Rule 6 (e), makes irrelevant an inquiry into the likelyhood of the risk of foreign prosecutions that he, MR. NIGRO, may face. In so holding, the Appellate Court candidly admitted that MR. NIGRO may find himself on the horns of a dilemma, but decides that the grant of statutory immunity "protects the Petitioner to some degree". The specific holding by the Court below is in direct conflict with decisions of the Second Circuit and will be discussed infra.

Since its decision in Zicarelli, no circuit court has decided the constitutional issue presented herein. Although confronted by the issue, the Fifth, Eighth and Ninth Circuits join

the Tenth Circuit in holding that the secrecy proivions of Rule 6 (e) precludes the showing of a real and substantial fear of foreign prosecution. See United States v. Brummitt, 665 F. 2d. 521, 525-526 (5th Cir., 1981), (cert. denied, 102 S. Court 2244 [1982]); In Re Baird, 668 F. 2d. 432, 434 (8th Cir., 1982), (cert. denied, 102 S. Court 2255 [1982]); In Re Lemieux, 597 F. 2d. 1166, 1167-68 (9th Cir., 1979). The Second Circuit, on the other hand, has twice declined to reply upon Rule 6 (e) and has, as the Supreme Court did in Zicarelli, addressed the factual issue of whether a real and substantial danger exists of foreign prosecution. In Re Flannigan, No. 82-6058 (2nd Cir., October 13, 1982); United States v. Yanagita, 552 F. 2d. 840 (2nd Cir., 1977). In both cases, the Second Circuit determined that a real and substantial danger of foreign prosecudid not exist and, therefore, failed to address the constitutional issue.

Several District Courts have ruled on the ultimate constitutional issue. Mishima v. United States, 507 F. Sup. 131 (D. Alaska, 1981); United States v. Trucis, 89 F.R.D. 671 (E.D. Penn., 1981);

In Re Cardassi, 351 F. Sup. 1080 (D. Conn., 1972). These courts have upheld the constitutional privilege against self-incrimination where a real and substantial fear of foreign prosecution exists. The issue of whether the Fifth Amendment applies extraterritorially in United States Courts is directly before the Court and should, with this case, be settled.

B

THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEAL AS TO WHETHER RULE 6 (e), FEDERAL RULES OF CRIMINAL PROCEDURE CAN SUPPLANT THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY NEGATING THE FACTUAL PREREQUISITES TO A REAL AND SUBSTANTIAL THREAT OF FOREIGN PROSECUTION

As noted above, the Fifth, Eighth, Ninth and Tenth Circuits avoid the constitutional question by holding Rule 6 (e) precludes a real and substantial fear of foreign prosecution. These Circuits are in direct conflict with the most recent decision of the Second Circuit in In Re Flannigan, supra. In short, the Second Circuit held:

> We do not believe that Rule 6 (e) guarantees as a practical matter that Grand Jury testimony will not be disclosed to a foreign power. Id.

The opinion of the Second Circuit is well justified. See, In Re Lemieux, supra, (concurring opinion of Judge Hufstedler). Both the Sixth and Fifth Circuits have criticized noted patterns of leaks in Grand Jury proceedings. See In Re Grand Jury Subpoenas, 573 F. 2d. 939 (reversed en banc 584 F. 2d. 1366 [6th Cir., 1978]); In Re Grand Jury Investigation, 610 F. 2d. 202 (5th Cir., 1980). The Computroller General's Report to Congress of October 16, 1980 criticizes the lack of secrecy and confidentiality before the Grand Jury. See G.G.D. 81-18. In its report, the Computroller General found disclosures were not necessarily made illegally or surreptitiously but were allowable or even required under existing laws and procedures. Even the Tenth Circuit recognized disclosure of the Petitioner's testimony may be mandatory pursuant to Brady v. Maryland, supra, the Jencks Act, 18 U.S.C. §3500 (e)(3) or pursuant to defense motions to dismiss based upon the jeopardy clause of the Fifth Amendment. Disclosure is the rule, nondisclosure the true exception.

The issue before the Court is ripe for decision. The circuits are divided

as to the proper application of Rule 6 (e) towards Grand Jury testimony that presents a real and substantial fear of foreign prosecution. Those Circuits supporting Rule 6 (e) simply state that statutory immunity coupled with prophylactic protection of Rule 6 (e) is equal to and coextensive with the constitutional grant of immunity. On the other hand, and in direct conflict with these circuits, the Second Circuit holds that 6 (e) cannot bolster or bootstrap that statutory grant of immunity. The grant of immunity must on its face be coextensive with and equal to the constitutional grant of immunity. These conflicts justify the grant of certiorari to review the judgment below. It is Petitioner's contention that disclosure of Grand Jury testimony is now the rule and not the exception.

C

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE CONSTITUTIONAL APPLICATION OF THE FIFTH AMENDMENT IN UNITED STATES COURTS ANT TO EXTERRITORIAL CRIMES

The Tenth Circuit's opinion in this case reflects important statutory, constitutional and policy considerations growing out of bonafide efforts to invoke

and raise a constitutional claim against self-incrimination. This Court had not addressed this issue since Zicarelli in 1972. Prior to Zicarelli, in 1970, the court summarily dealt with the issue in In Re Parker, 411 F. 2d. 1067 (10th Cir., 1969), (vacated as moot sub. nom. Parker v. United States, 397 U.S. 96 [1970]). In Parker, the Tenth Circuit had held that the Fifth Amendment does not apply extraterritorially. The Supreme Court vacated that decision. Since Parker and Zicarelli, the issue has come before numerous District Courts and Circuit Courts. There is little or no uniformity in addressing the prerequisites to raising the constitutional questions or dealing with the constitutional question itself. This case properly raises those issues and should be decided at this time.

QUESTION 3

THE COURT BELOW HAS SO FAR DEPARTED FROM THE EXCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY SANCTIONING A 28 U.S.C. §1826 (a) ORDER TO SHOW CAUSE HEARING THAT PROHIBITED THE RECALCITRANT PETITIONER FROM HAVING A MEANINGFUL OPPORTUNITY TO SHOW CAUSE WHY HE SHOULD BE BE HELD IN CONTEMPT OF COURT

Due process of law has long been recognized as the corner stone of the

American judicial system, jurisprudence and philosophy. 28 U.S.C. §1826 provides in part, for a hearing to determine if a Witness has "just cause" in refusing to comply with a court order. All Circuit Courts have interpreted the statute as requiring reasonable notice and an adequate opportunity to raise claims and have them determined by court. See In Re Lochiatto, 497 F. 2d. 803 (1st Cir., 1974); In Re Sadin, 509 F. 2d. 1252 (2nd Cir., 1975); In Re Grand Jury Investigation, 545 F. 2d. 385 (3rd Cir., 1976); United States v. Bowe, 491 F. 2d. 970 (8th Cir., 1974); United States v. Alter, 482 F. 2d. 1016 (9th Cir., 1973); In Re Vigil, 524 F. 2d. 209 (10th Cir., 1975); In Re Grand Jury Proceedings, 491 F. 2d 42 (D.C. Cir., 1974).

This Court in United States v. Gelband, 408 U.S. 41 (1972) held that a Grand Jury Witness had a meaningful opportunity to present defenses to a contempt citation at a contempt hearing. The specific holding in Gelband stated the use of an illegal electronic surveillance constituted a valid defense to a contempt proceeding pursuant to 28 U.S.C. §1826 (a)(1).

Basically, the proceeding invisioned by statute is an order to show cause why an individual should not be held in contempt for violating a court order. It is the Petitioner's position that he was denied an opportunity to present "just cause" when the Court:

1. Failed to notify the Appellant that the September 24, 1982 hearing was an order to show cause hearing pursuant to 28 U.S.C. §1826;

2. Failed to give reasonable notice, forty (40) hours, in light of:

   A. The issues before the court;

   B. The Witness' request for two (2) evidenciary hearings;

   C. The Witness' request for Brady Material;

   D. The Witness' request to subpoena out of state witnesses.

3. Provided only twenty (20) minutes to Appellant to argue and litigate all pending matters including six (6) substantive motions, one (1) discovery motion and one (1) petition for restraining order was insufficient and denied Appellant a fair opportunity to argue, litigate and present his case;

4. Did not give the Witness an opportunity to present

mitigating circumstances in regards to the contempt of court sentence.

The District Court did not permit the Witness a meaningful opportunity to present his defenses and to subpoena out of state witnesses. The District and Circuit Courts departed from the accepted and usual course of judicial due process and this Court should not sanction such departure of due process and statute. It is important for this Court to determine and clarify statutory and constitutional law as it is applied to a contempt of court proceeding.

QUESTION 4

THE COURT BELOW IN PERMITTED THE USE OF RULE 11 (e)(6) STATEMENTS HAS SANCTIONED CONDUCT EXPRESSLY PROHIBITED BY STATUTE AND HAS DEPARTED FROM AN ACCEPTABLE STATUTORY INTERPRETATION

In order to facilitate plea and settlement negotiations, this Court and Congress has recognized one (1) side or the other must make certain consessions, admissions or allegations, not ordinarily made in the course of judicial proceedings. Rule 11 (e)(6), Federal Rules of Criminal Procedure. The rule codifies a long standing evidenciary rule concerning settlement

negotiations. It now exists as statutory exception or exlusionary rule for extraordinary conversations and negotiations.

The rule itself specifies under what conditions statements made in connection with the negotiations can be used. One (1) of the exceptions is where the plea negotiations are successful and a plea results from the negotiations.

In this case, the negotiations were unsuccessful. However, the court below permitted a plea independant of the negotiations to satisfy the plea requirement of the rule. This interpretation seriously attenuates the purpose and function of the statute and rule. This Court cannot sanction such conduct. What is before the Court is an important federal issue regarding the application of Rule 11 (e)(6). To permit the interpretation given by the lower court, would defeat the purpose of this statute and the intent of the parties.

QUESTION 5

THE COURT BELOW DECIDED AN IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE "SHOWING" REQUIREMENT OF 18 U.S.C. §3504 (a)(1) WHICH HAS NOT, BUT SHOULD BE SETTLE BY THIS COURT

The question before the Court is what constitutes a sufficient showing in order to comply with the statutory requirements of 18 U.S.C §3504 (a)(1). That statute requires a showing each time there is an allegation that illegal electronic surveillance is being used before a Grand Jury. In this case before the Court, a hearsay statement by a nonparticipating prosecutor was held to be sufficient to comply with the statutory "showing" requirement.

The Petitioner has alleged unlawful surveillance. The government has admitted judicially unauthorized or unapproved surveillance. This Court has held in United States v. Gelband, surpa, that the government may not use illegally seized wire-tap evidence to interrogate an aggrieved Witness before a Federal Grand Jury. Furthermore, the court held that a refusal to testify by a recalcitrant Witness based upon the claim of unlawful surveil-lance could constitute just cause within the meaning of 28 U.S.C. §1826 (a) for not testifying.

The issue has crystalized in this case. The government admits judicially unauthorized surveillance but claims the statutory exception of consent. It is the Petitioner's position that this claim is insufficient to satisfy 18 U.S.C. §3504 (a)(1). Several Circuits have permitted the sworn affidavits of an attorney denying the existence of electronic surveillance. United States v. Fitch, 472 F. 2d. 458 (9th Cir., 1973); In Re Mintzer, 511 F. 2d. 471 (1st Cir., 1974); In Re Grand Jury Proceedings, 463 F. 2d. 226 (5th Cir., 1974). Some Circuits have also accepted oral statements by the government alleging prior adjudication on the merits of electronic surveillance. United States v. Stevens, 510 F. 2d. 1101 (5th Cir., 1975). Other Circuit Courts have held that blanket denials without first hand inquiry are insufficient to comply with 18 U.S.C. §3504 (a)(1). In Re Quinn, 525 F. 2d. 222 (1st Cir., 1975); United States v. Alter, 482 F. 2d. 1016 (9th Cir., 1973). See also, In Re Vigil, supra. It is necessary for this court to determine what showing or hearing is required once a claim of illegal electronic surveillance is made prior to an order

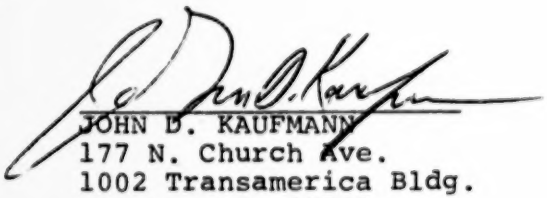
to show cause hearing.

VII

CONCLUSION

For the reasons cited above, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

SUBMITTED this 3rd day of February, 1983



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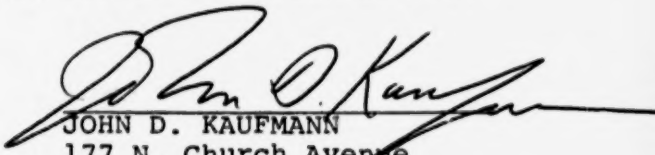
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1983, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the United States Attonrey's Office through its agent, GERALD RAFFERTY, Federal Office Building, Suite 1200, Drawer 3615, Denver, Colorado. Counsel for Respondent. I further certify that all parties required to be served have been served.



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12-16-82 82-2422

APPENDIX 1

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

PUBLISH

FILED
United States Court of Appeals
Tenth Circuit
DEC 16 1982
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re Grand Jury Proceeding 82-2	)	
EDWARD ROBERT NIGRO, JR., (Real Party in Interest,)	)	
Appellant,	)	
v.	)	No. 82-2422
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 82-Y-101)

John D. Kaufmann, Tucson, Arizona, for Appellant.

Gerald J. Rafferty, Assistant United States Attorney, Denver, Colorado, (Robert N. Miller, United States Attorney, Denver, Colorado, with him on the brief) for Appellee.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

Appellant Edward Nigro seeks to reverse entry of a contempt citation by the District Court of the District of Colorado and seeks also remand with instructions that he be free to invoke his fifth amendment privilege against self-incrimination before the grand jury and to have it applicable to a matter which would incriminate him in foreign countries. Nigro assigns a number of grounds in support of his demand for relief. All were considered by the trial court except one, which is whether there should have been a hearing regarding facts which would mitigate the contempt sanctions. The grand jury which was investigating alleged violations of federal narcotics, customs and other laws, subpoenaed Nigro to appear before it and give testimony on July 27 and 28, 1982. He did appear before the Grand Jury on the basis of issuance of a writ of habeas corpus. He refused, however, to testify. Instead he invoked his privilege against self-incrimination. Thereupon following a motion by the United States Attorney the trial court entered an order granting immunity pursuant to 18 U.S.C. §§ 6002 and 6003. The court order dated July 28, 1982, is in part as follows:

> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against said witness in any criminal case, in any court, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

The questions which Mr. Nigro refused to answer had to do with illegal import and export of money between the United States and foreign countries; illegal laundering of narcotics money inside and outside the territory of the United States; illegal laundering of narcotics money through offshore corporations or banks; and sources of money received from operation of narcotics operation. Nigro was called back before the grand jury and given another opportunity to answer questions, but he refused again to answer anything and thereupon the government moved that the trial court punish Nigro for his refusal to comply with the court order compelling his testimony pursuant to 28 U.S.C. § 1826(a).

Thereupon Nigro sought to have the grand jury subpoena quashed on the basis that the court's immunity order would not extend to foreign prosecutions and, secondly, that it would not afford him protection co-extensive with his privilege against self-incrimination. He also alleged procedural irregularities and directed other attacks against his incarceration.

On September 24, 1982 a hearing was held. A carefully written opinion was issued on November 17, 1982 by the trial court. It rejected all of the grounds Mr. Nigro asserted in his effort to justify his refusal to testify notwithstanding his grant of immunity.

The trial court gave no acceptance to the foreign prosecution point. The judge said: "Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and

based on objective facts as distinguished from his subjective speculation." The court further found that Mr. Nigro showed insufficient connection between the areas of the grand jury's inquiry and potential foreign prosecution for his testimony. Thus there was no evidence that if charges were filed in a foreign country, Nigro would be subject to extradition from the United States; there was insufficient evidence to believe that Nigro's testimony would be disclosed to a foreign government; and there was no showing of a risk that the evidence might incriminate Nigro in a foreign jurisdiction.

Also found by the trial court was that Nigro's claims were generally without merit. His motions for discovery were premature and contrary to Rule 6(c), F.R. Cr.P. He was an immunized witness before the grand jury and was not a target in the proceedings. His contention that he could not comply with the order to testify because the government's questions were tainted by illegal electronic surveillance were rejected because the trial court found that only valid consensual surveillance occurred and that the government would give the transcripts of those conversations to Mr. Nigro.

The further contention of Nigro was that some of the questions he was asked before the grand jury included information derived from plea discussions held in Tucson, Arizona about possible charges in Colorado conducted pursuant to Rule 11(e)(6), F.R.Cr.P. These discussions did not result in any agreement and Nigro entered a guilty plea to the Arizona charges in the United States District Court for Arizona. The

trial court ruled that since such a plea was entered Mr. Nigro's statements were available to the government under Rule 11(e)(6)(D), F.R.Cr.P. Therefore, Mr. Nigro could not be excused from testifying before the grand jury on such a basis.

Also rejected by the trial court was Nigro's assertion that the grand jury proceedings had been tainted; this as a result of an Assistant United States Attorney, a court reporter and Nigro himself being present during the deliberations and voting of the grand jury. The "deliberations" were only a momentary consideration which occurred after the United States Attorney asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. The trial court viewed the taint as insignificant and only a technical violation of Rule 6(d) F.R.Cr.P. Inasmuch as Nigro was an immunized witness he was not prejudiced in any event.

The trial court concluded that there was nothing in the record that precluded Nigro from testifying before the grand jury and the trial court found him in civil contempt for his refusal to obey its lawful order. He is subject to being confined until he agrees to testify before the grand jury or until the particular grand jury is terminated. The time spent in jail by Nigro as a result of this contempt sentence is not to be credited to the sentences he is already serving.

Defendant has tendered numerous contentions. We do not deem it necessary to consider each and every one. These can be reduced to the following:

I.

That the District Court erred in that it violated 28 U.S.C. 1826 by not issuing an order to show cause, by failing to give adequate notice.

II.

That the trial court erred in determining that the fifth amendment (of the Constitution) is inapplicable to foreign prosecution and that the appellant does not face a real and substantial fear of the foreign prosecution.

A.

That the fifth amendment applies to the threat of prosecution.

B.

That the immunity granted was not co-extensive with the fifth amendment privilege against self-incrimination.

There is only one essential problem and we address ourselves to that. We consider in detail only one of appellant's contentions.

1. Adequacy of Safeguards for grand jury secrecy.

Mr. Nigro's fifth amendment arguments lose their importance if the emphasis is placed where it belongs, that is on the sufficiency of Rule 6(e), F.R.Cr.P. That rule's guarantees of secrecy for Mr. Nigro's compelled disclosures are such that he has no reason to fear foreign prosecutions based on his grand jury testimony. The trial court followed the majority of circuits when it concluded that "in view of the power and duty of this court to preserve the secrecy of grand jury matters, no 'real and substantial' danger of foreign prosecution exists based on his ordered testimony." This court can confidently affirm that rule.

The Supreme Court in Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 478 set forth the standard that a witness must satisfy to invoke the privilege against self-incrimination. Applied to Mr. Nigro Zicarelli means he must show that his fears of foreign prosecution are real, and based upon objective facts; the fifth amendment privilege "protects against real dangers, not remote and speculative possibilities." Id. The majority of the circuits which have considered whether an immunized witness is compelled to testify before a grand jury was adequately protected from leaks of his testimony to foreign authorities seeking to prosecute him, have held that grand jury proceedings are sufficiently secret to eliminate any reasonable concerns the witness may have as to foreign prosecutions. In re Baird, 668 F.2d 432, 434 (8th Cir.), cert. denied, 102 S.Ct. 2255 (1982); United States v. Brummitt, 665 F.2d 521, 525-26 (5th Cir. 1981), cert. denied, 102 S.Ct. 2244 (1982); In re Campbell, 628 F.2d 1260, 1262 (9th Cir. 1980); In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166, 1167-68 (9th Cir. 1979); In re Grand Jury Proceedings (Postal), 559 F.2d 234, 236-37, (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); United States v. Armstrong, 476 F.2d 313, 316 (5th Cir. 1973); In re Tierney, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

This court has already affirmed the adequacy of Rule 6(e), F.R.Cr.P. as a safeguard for the secrecy of immunized testimony before a grand jury where there was a threat of foreign prosecution alleged. In re Parker, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated as moot sub nom. Parker v. United States, 397 U.S. 96 (1970). Our viewpoint on this has not changed.

The few courts which have expressed reservations about the secrecy of grand jury proceedings have pointed out a number of factors which suggest that such proceedings cannot be leakproof. The Second Circuit's recent decision, In Re Flanagan, No. 82-6058 (2nd Cir., Oct. 13, 1982), for instance makes the following points:

> 1. Grand jurors or government agents might inadvertently leak testimony to reporters.
>
> 2. Other defendants can require disclosure of grand jury minutes containing exclupatory material under Brady v. Maryland, 373 U.S. 83 (1963).
>
> 3. Defendants can also require trial witnesses to disclose their grand jury testimony regarding matters testified to on direct examination. 18 U.S.C. § 3500(e)(3).
>
> 4. Courts permit disclosure of grand jury minutes when they are relevant to a motion to dismiss an indictment, or raising a double jeopardy claim or challenging a search warrant, or concerning post-conviction proceedings.
>
> 5. Grand jury records can also be released for use in private litigation.

See Flanagan, supra, slip op. at 59-60, and the authorities cited therein. See also In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166, 1168-69 (9th Cir. 1979) (Hufstedler, J., concurring); In re Cardassi, 351 F.Supp. 1080 (D.C. Conn.

1972) The suggestions do not rise above remote possibilities.

This court is not unaware of the hesitancy of a witness in Nigro's position even though Nigro is solely responsible for the difficulty of his position. He has violated the laws of several countries and must testify about those illegal activities before a grand jury if the trial court's order is affirmed. He must weigh the certainty of a contempt citation here against the likelihood of someday being prosecuted abroad should he be extradited or otherwise come within the jurisdiction of foreign laws he has broken. He has been, however, given immunity so he is not too bad off.

To protect him from the possibility of facing foreign prosecutions based on incriminating disclosures before the grand jury this court should affirm the trial court's contempt citation, but return the case to that court with the following recommendations which will promote and support secrecy by adherence to Rule 6(e) in Mr. Nigro's case:

1. The district court should require all participants in the grand jury proceedings to take an oath of secrecy regarding Mr. Nigro's testimony.

2. The transcript of his immunized testimony should be sealed.

3. Future requests for disclosure should be reviewed in camera by the district court which should zealously protect the immunity it conferred upon Mr. Nigro.

These measures are endored by the United States as appellee, see Appellee's Brief at 12-13, and this type of protection has found approval in other decisions; In re Federal

Grand Jury Witness (Lemieux), 597 F.2d 1166, 1167-68 (9th Cir. 1979); In re Tierney, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

The affirmation of Parker above means it is unnecessary to consider whether Mr. Nigro showed a sufficient risk of foreign prosecution to entitle him to remain silent. The conclusion that Rule 6(e), F.R.Cr.P., as bolstered by the recommendations above, will adequately protect the secrecy of Mr. Nigro's disclosures makes irrelevant an inquiry into the likelihood of the risks of foreign prosecutions he may face.

2. Grand Jury Proceedings and Civil Contempt Procedures

Due to the constraints of 28 U.S.C. § 1826(b) which purports to require this court to decide this appeal within 30 days of its filing, it is impossible to address in this opinion each issue Mr. Nigro raises as fully as this court might do in less hurried circumstances.

The court has considered the positions presented in the briefs and oral arguments. We find no error in the trial court's conclusions of law expressed in its Memorandum Opinion and summarized above. It follows that the judgment of the district court including the contempt citation against Mr. Nigro should be affirmed. It is so ordered. We do not consider the other contention based upon the fifth amendment. Our ruling renders this unnecessary.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Misc. No: 82-Y-101

IN RE GRAND JURY PROCEEDING 82-2 (RELATING TO EDWARD ROBERT NIGRO, JR., Petitioner)	)))))	MEMORANDUM OPINION AND ORDER

CHIEF JUDGE SHERMAN G. FINESILVER:

This matter is before the Court on two principal matters: (1) Petitioner's Motion to Quash Writ of Habeas Corpus Ad Prosequendum filed by Edward Robert Nigro, Jr., Petitioner; and (2) the Government's Petition Pursuant to 28 U.S.C. §1826(a) for a Rule to Show Cause why Mr. Nigro should not be held in contempt of court for failure to give testimony before a federal grand jury. Mr. Nigro was subpoenaed to appear before a federal grand jury in Colorado which was investigating alleged violations of federal narcotics, customs and other laws.[1] On July 27 and 28, 1982, Mr. Nigro appeared before Grand Jury 82-2 pursuant to a Writ of Habeas Corpus. Mr. Nigro refused to testify invoking his privilege against self-incrimination. Thereafter, upon appropriate motion by the United States Attorney and supporting documents an order granting immunity was entered pursuant to 18 U.S.C. §§ 6002 and 6003. The court order dated July 28, 1982, reads in part as follows:

> NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. §6002:
>
> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from

---

1/ Title 21 U.S.C. §§841(a)(1), 846 and 848; Title 18 U.S.C. §2; and Title 26 U.S.C. §§7203 and 7206(1).

Mr. Nigro refused to answer questions concerning illegal import and export of money between the United States and unnamed countries; illegal laundering of narcotics money inside and outside the territorial United States; illegal laundering of narcotics money through off-shore corporations or banks; sources of money received from operation of narcotics operation.

such testimony or other information) may be used against said witness in any criminal case, in any court, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

Mr. Nigro returned to the grand jury on the same date the immunity order was entered and refused to answer any questions. The Government moved the court for entry of sanctions against Mr. Nigro for his refusal to comply with the court order ordering his testimony [28 U.S.C. § 1826(a)].

Thereafter, Mr. Nigro through his counsel, moved to quash the grand jury subpoena alleging (a) that the court's immunity order would not safeguard him from foreign prosecution and (b) it would not afford him protection co-extensive with his privilege against self-incrimination.

Mr. Nigro also asserted other grounds for not testifying, alleging procedural irregularities and other attacks directed against his incarceration. Motions that had been filed on his behalf include violations of Rule 6, F.R.Cr.P., abuse of process and others.

A hearing on the Motion was held on September 24, 1982, at which time Mr. Nigro set forth his reasons for denial of testimony.

I.

The main issue involved is whether a witness who has been granted immunity against the use of his testimony in federal and state prosecutions may present possible foreign prosecution as a basis for his claim of self-incrimination before a grand jury.

In the context of the factual backdrop of this case, we answer in the negative.

Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and based on objective facts as distinguished from his subjective speculation. Fifth amendment "privilege protects against real dangers, not remote and speculative possibilities". Zicarelli v. New Jersey

State Commission of Investigation, 406 US. 472, 478 (1972). The individual seeking to invoke the fifth amendment privilege against self-incrimination bears the heavy burden of establishing (1) that the subject of the Government's questions raises "real danger", that the individual may be compelled to disclose information that might incriminate him under foreign law and (2) that he legitimately entertains a "real and substantial" fear that his prosecution by a foreign government is likely to follow. United States v. Wanagita, 552 F.2d 940, 946 (2d Cir. 1977).

Provisions of the constitution and fifth amendment apply only to restrain officials who act under the laws of the United States; they do not extend their protection to persons who are subject to prosecution by wholly unrelated governments abroad. In Re Parker, 411 F.2d 1067 (10th Cir. 1969) vacated as moot sub nom. Parker v. United States, 397 U.S. 96 (1970). In In Re Parker the trial court held a witness in civil contempt for refusing to answer grand jury questions. In a thorough and well reasoned opinion, the appellate court affirmed. The case remains strong precedent in this circuit.

In Re Parker, supra, holds (a) that the secrecy attending grand jury proceedings serves as a sufficient protection for an immunized witness that there is no real risk of foreign prosecution and (b) the witness cannot invoke her privilege against self-incrimination after receiving court immunization. Id, at 1069. In accord, Zicarelli v. New Jersey State Commission of Investigation, 406 US. 472 (1972).

In In Re Parker the trial and appellate courts were directed to the body of law of a specific country (Canada) to determine whether there was a danger of incrimination under the law of that foreign country. In the instant case, Mr. Nigro in his broad claim of protection merely asserts that he may be subject to charges by some unnamed foreign jurisdiction. Clearly, his claim of privilege against prosecution is speculative and lacks any specificity. In the stronger case of In Re Parker the claim of the immunized witness was disallowed.

We have considered and reject Mr. Nigro's argument that public disclosure of his grand jury testimony is inevitable and that when such disclosure occurs, various foreign jurisdictions will descend upon him. However, upon inquiry by the Court at the time of oral argument, counsel for Mr. Nigro was unable to cite a single case or present any legal precedent where foreign prosecutors sought extradition and prosecution of a grand jury witness on the basis of his immunized testimony.

Mr. Nigro is adequately protected by the provisions of Rule 6(e), F.R.Cr.P. requiring that grand jury testimony be kept secret and this safeguard eliminates any reasonable ground for apprehending foreign prosecution. In Re Parker, supra; In Re Baird, 668 F.2d 432, 434 (8th Cir. 1982), cert. denied, 102 S.Ct. 2255 (1982); United States v. Brummitt, 665 F.2d 521, (5th Cir. 1981), cert. denied, 102 S.Ct. 2244 (1982); In Re Campbell, 628 F.2d 1260 (9th Cir. 1980); In Re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 US 914 (1973). See discussion in In Re Flanagan, ____F.2d____ (2d Cir. 1982) Slip Opinion, October 13, 1982.

Another important factor is that the grant of immunity is as broad as possible under 18 U.S.C. §§ 6002 and 6003; it is co-extensive with the self-incrimination privilege under the constitution and applicable law. Petitioner can expect no more. Under Rule 6(e)(2)[2] Government attorneys are not authorized to disclose grand jury testimony to foreign authorities without prior Court authorization. Although Rule 6(e)(3)(a) permits disclosure to an attorney for the Government "for use in the performance of such attorney's duty and to government personnel deemed necessary to assist an attorney for the government in enforcing federal criminal law" that exception does not allow federal law enforcement personnel to turn over grand jury materials to foreign officials without first obtaining a court order under Rule 6(e)(3)(c)(i). See, In Re Baird, supra, at 434 and United States v. Brummitt, supra, at 524.

2/ See Appendix for excerpt of Rule 6, F.R.Cr.P.

Mr. Nigro's argument ignores the fact that a court which has granted immunity to a grand jury witness who demonstrates a "real danger" that his compelled testimony could provide a basis for foreign prosecution would be unlikely to permit disclosure of grand jury testimony to foreign authorities.

As one court has observed:

> To infer that this court would on the one hand give defendant immunity, and on the other hand renege on its own integrity is so difficult to assume it is speculative. Only the court can give immunity; only the court can order the witness to answer; only the court can order disclosure.

See, United States v. Brunmitt, supra, 525 n.4; See also, In Re Tierney, supra; In Re Campbell, supra; and In Re Parker, supra.

If disclosure is requested by foreign authorities, or if disclosure is sought on other grounds at a later stage in the proceedings, appropriate steps can be taken to minimize any risk that immunized testimony would be disclosed in violation of a witness's constitutional rights. See Kastigar v. United States, 406 US. 441, reh. denied, 408 US. 931 (1972)

Clearly in view of the power and duty of this Court to preserve the secrecy of grand jury matters, no "real and substantial" danger of foreign prosecution exists based on his ordered testimony. Zicarrelli v. New Jersey State Commission of Investigation, supra; In Re Parker, supra; and see special concurring opinion In Re Flanagan, supra, Slip Opinion October 13, 1982, page 62, 63.

In Re Flanagan, ____F.2d____, (2d Cir. 1982) (Slip Opinion October 13, 1982) is the latest authority to uphold the requirement of testimony under grant of immunity notwithstanding a claim of potential foreign prosecution.

Flanagan was subpoenaed to testify before a grand jury investigating a conspiracy to smuggle fire arms and ammunition from the United States to the Irish Republic Army in Ireland, in violation of 26 U.S.C. § 5861 and 22 U.S.C. §§ 2778(b)(2) and (c). He asserted his fifth amendment privilege to refuse to testify on the grounds of self-incrimination. An order was entered pursuant to 18 U.S.C. §§ 6002 and 6003, compelling him

to "give testimony or provide other information...as to all matters about which he may be interrogated before the grand jury". Notwithstanding the immunity grant, Mr. Flanagan persisted in invoking the fifth amendment and refused to answer questions before the grand jury claiming that because the immunity order did not purport to protect him from prosecution in Ireland or the United Kingdom, it could not supplant his constitutional privilege against self-incrimination.

The circuit court reviewed current authorities and reversed the trial court's refusal to hold Mr. Flanagan in civil contempt for his refusal to testify before a grand jury under a grant of immunity. The appeal's court held that interrogation before the grand jury would not violate his right of protection against self-incriminations since Flanagan failed to demonstrate any real or substantial fear of foreign prosecution as a result of his giving grand jury testimony. The appellate court did not decide the question whether, when immunity is granted a grand jury witness, the fifth amendment protects him against disclosure of information that would expose him to a substantial risk of foreign prosecution. Judge Van Graafeiland, in a special concurring opinion, held in effect that the spirit and tenor of Rule 6 (3) of the F.R.Cr.P. would afford the petitioner sufficient protection and that the "likelihood is that the tradition of grand jury secrecy, which is older than the Nation itself... will not be cavalierly disregarded."

There is another point urged in petitioner's argument. He contends that the existence of foreign narcotics laws and membership by many countries in a compact outlawing violations of said laws, legitimatizes his "real fear of prosecution". In support, he cites the 1961 Multilateral Single Convention on Narcotics Law; 18 U.S.C. § 1407. This statute must be read together with 26 U.S.C. § 1739 (Amending Protocol). In our view this argument does not support petitioner's position.

A reading of the applicable statutes lead to the conclusion that the Single Convention and Amending Protocol require the member countries to the convention to be bound to

observe the constitutional, legal and administrative systems of member nations. According to our analysis, this would include grants of immunity.

In sum we find that there is no existence of potential foreign prosecution of Mr. Nigro; no nexus has been established between areas of inquiry of the grand jury and potential foreign prosecution for this testimony; there is no evidence that if charges were filed in a foreign country, Mr. Nigro would be subject to extradition from the United States; the likelihood that Mr. Nigro's testimony would be disclosed to a foreign government has not been established; and further the risk is not sufficiently substantial to justify a real fear that the evidence might incriminate Mr. Nigro in a foreign jurisdiction.

Mr. Nigro's refusal to testify on the grounds stated under the several motions is without support in fact or law.

The Court finds in favor of the Government and against the claim of the Petitioner.[3]

II.

The procedural arguments advanced by Mr. Nigro with regard to alleged abuses by the government simply do not provide a basis for non-compliance with the order to present testimony. No abuse has been demonstrated at this point. The request for discovery by Mr. Nigro ignores the fact that he is not a target in the grand jury proceedings. He is an immunized witness before the grand jury. If he should be indicted as a result of these proceedings, protections outlined in Kastigar v. United States, 406 U.S. 411 (1972), would be applicable. However, at this stage of the proceedings, these motions are at best premature and contrary to Rule 6(e) F.R.Cr.P.

Mr. Nigro also contends that he could not comply with the order to testify because the government's questions are tainted by illegal electronic surveillance. The allegation is without any substantiation. On September 24, 1982, at the hearing on

3/ We note that the point involved in this case has been a subject of several law reviews and legal publications as noted in the Appendix.

this matter, the government announced that it had conducted a search of its files and could find no illegal electronic surveillance of the witness. However, valid consensual surveillance did occur. The government has agreed to provide the transcripts of those conversations. In light of these facts, alleged electronic surveillance does not afford a basis to avoid our order of July 27, 1982.

While the government has responded, we do note Mr. Nigro has not made even a preliminary showing necessary to request the government to respond to his claim of illegal electronic surveillance. The claim and cursory information submitted by Mr. Nigro is such unsubstantial evidence that it places no burden on the government to "affirm or deny" the existence of wiretapping. See In Re Grand Jury (Vigil) 524 F.2d 209, 214 (10th Cir. 1975), cert. denied 425 U.S. 927 (1976).

However, assuming that the showing by Mr. Nigro was adequate to trigger a government response, the answer and denial by the government on this point was sufficient. The witness cannot avoid testimony on the grounds advanced. See Gelbard v. United States, 408 US. 41, 71 (1972) (White, J. concurring) and United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977).

III.

Mr. Nigro also contends that some of the questions propounded to him before the grand jury include information derived from plea discussions held in Tucson, Arizona, among his attorney, two government prosecutors, and government agents from Colorado. It appears that during Mr. Nigro's plea discussions concerning the Arizona charges, he and his attorney attempted to resolve his status with regard to the investigation now pending before Grand Jury 82-2 by proffering some information to the Colorado agents in return for a commitment not to prosecute him. All parties now agree these discussions were conducted pursuant to Rule 11 (e)(6) F.R.Cr.P. After these discussions failed to result in any agreement, Mr. Nigro proceeded to enter a guilty plea in the United States District Court for Arizona.

Rule 11 (e)(6)(D) F.R.Cr.P. is informative. Under that Rule, Mr. Nigro's statements to the prosecutors and agents in Arizona would be admissible in any civil or criminal proceeding once a plea of guilty was accepted and not withdrawn. Rule 11 (e)(6) F.R.Cr.P.; See also, 1C. Wright, Federal Practice and Procedure § 11.8(4) (1969). Since such a plea was entered, these statements are available to the government. Accord, United States v. Benson, 640 F.2d 136 (8th Cir. 1981). Therefore, this argument does not afford Mr. Nigro an excuse not to present testimony before the grand jury.

IV.

Mr. Nigro also asserts that Grand Jury 82-2 has been tainted and should be excluded from hearing any other matters concerning him. He alleges that Rule 6(d) F.R.Cr.P. was violated, as Gerald J. Rafferty, Esq., an Assistant United States Attorney, a court reporter and Mr. Nigro himself were present during grand jury deliberations and voting. The incident occurred after Mr. Rafferty asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. In our view such conduct amounted to only a technical violation of Rule 6(d). In any event any taint is insignificant and does not justify Mr. Nigro's refusal to testify before Grand Jury 82-2. Mr. Nigro's rights have not been prejudiced by the incident. Mr. Nigro at this point in time is in the position of an immunized witness.

V.

Finally, Mr. Nigro has failed to support his Motion to Quash the Writ of Habeas Corpus for failure of the Department of Justice to follow its guidelines forbidding a target defendant to be called as a witness before a grand jury and his Motion to Quash the Writ for abuse of process. Contrary

to his position, the government has not used the grand jury to punish or abuse Mr. Nigro. All Motions filed by Mr. Nigro are DENIED.

VI.

The above constitute the findings of facts and conclusions of law.

VII.

In light of the above discussions, the Court finds as follows:

1. Grand Jury 82-2 for the District of Colorado is conducting an investigation involving possible violations of narcotics, currency and customs laws including Title 21 U.S.C. §§841(a)(1), 846 and 848; Title 18 U.S.C. §2; and Title 26 U.S.C. §§7203 and 7206(1).

2. On July 27, 1982, this Court directed Edward Robert Nigro, Jr. to provide testimony to the grand jury, pursuant to 18 U.S.C. §§6002 and 6003(a).

3. On July 28, 1982, Edward Robert Nigro,Jr. appeared before Grand Jury 82-2 and refused to provide said testimony on the basis of various grounds discussed above.

4. After careful review of the briefs and the applicable law we find Edward Robert Nigro, Jr. has no constitutional privilege or other justification for refusing to provide testimony to Grand Jury 82-2.

O R D E R

Edward Robert Nigro's Motions to Quash the Writ of Habeas Corpus and all Motions are hereby DENIED.

The Petition of the Government pursuant to 28 U.S.C. §1826(a) for a Rule to Show Cause is GRANTED.

It is adjudged that Edward Robert Nigro, Jr. is in civil contempt of this Court for his refusal to obey the lawful order of this court and give testimony or provide other information to the grand jury.

IT IS THEREFORE ORDERED that Edward Robert Nigro, Jr. be and is hereby committed to confinement until such time as Edward Robert Nigro, Jr. is willing to give such testimony

or provide such information to the grand jury.

DATED this 10 day of November 1982, in Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver

SHERMAN G. FINESILVER, Chief Judge
United States District Court

ENTERED
ON THE DOCKET

NOV 12 1982

JAMES R. MANSPEAKER
CLERK

BY _____

APPEARANCES OF COUNSEL:

John P. Oppenheim, Esq., and John D. Kaufman, Esq. appearing on behalf of the witness;

Robert N. Miller, Esq., United States Attorney, and Gerald J. Rafferty, Esq., Assistant United States Attorney appearing on behalf of the Government

APPENDIX

2/

RULE 6. The Grand Jury

.....

(e) Recording and Disclosure of Proceedings.

.....

(2) General Rule of Secrecy.--A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

3/

Comment, Fear of Prosecution and the Fifth Amendment, 58 Iowa L.Rev. 1304 (1972). Note, Testimony Incriminating Under the Laws of a Foreign Country -- Is there a Right to Remain Silent?, 11 N.Y.U. J. Internat. Law and Pol. 359 (1978); Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission; The Fifth Amendment Does Not Protect Federal Grand Jury Witnesses From Being Compelled to Give Testimony Which Would Incriminate Them in a Foreign Jurisdiction, 8 Tex. Int. L. J. 262 (1973); and Federal Witness Immunity Problems & Practice under 18 U.S.C. §§ 6002-6007, 14 American Criminal Law Review 275, 288 (1976).

APPENDIX 3

1. Fifth Amendment to the United States Constitution:

   No person shall be held to answer for capital, or otherwise infamous crime, . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . . .

2. 18 U.S.C. §6002 - Immunity:

   Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillar to-

   1. A court or Grand Jury of the United States,

   2. An agency of the United States, or

   3. Either house of Congress, a joint committee of the two houses or committee or sub-committee of either house,

   and the person presiding over the proceeding communicates to the Witness an order issued under this party, the Witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except prosecution for perjury

giving a false statement, or otherwise failing to comply with the order.

3. 28 U.S.C. §1826 - Recalcitrant Witness:

A. Whenever a Witness in any proceeding before or ancillary to any court or Grand Jury of the United States refused without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document or record, recording or other material, the court, upon such refusal or when refusal is duly brought to its attention may summarily order his confinement at a suitable place until such time as the Witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-

1. The court proceeding, or

2. The term of the Grand Jury, including extensions, before which such refusal to comply with a court order occurred, but in no event shall such confinement exceed eighteen (18) months.

B. No person confined pursuant to subsection A of this section shall be admitted to bail pending the determination of any appeal taken by him from the order of his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as

soon as practical, but no later than thirty (30) days after the filing of said appeal.

4. 18 U.S.C. §3504 (a)(1) - Litigation concerning sources of evidence:

   A. In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States:

      1. Upon a claim by a party agreed that evidence is admissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

   B. As used in this section "unlawful act" means any act, the use of any electronic, mechanical, or other device (as defined by §2510 (5) of this Title) in violation of the constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

5. Federal Rules of Criminal Procedure, Rule 6 (e)(2) and (3) - Rule of Secrecy and Exceptions:

   (e) The Grand Jury - Disclosure of Proceeding.

   (2) A grand juror, an interpretor, stenographer, an operator of a

recording device, a typist who transcribed recorded testimony, an attorney for the government, or any person to whom disclosure is made under Paragraph 3 (a) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) (a) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberation and vote of a grand jury, may be made to-

(i) any attorney for the government for use in the performance of such attorney's duties;

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duties to enforce federal criminal law.

(3) (b) Any person to whom matters are disclosed under subparagraph (a)(ii) of this paragraph shall not utilize the grand jury material for any other purpose other than assisting the attorney for the government in the performance of such attorney's duties to enforce federal criminal law. An attorney for the

shall prompty provide the District Court, before which was enpaneled the Grand Jury whose material had been so disclosed with the names of the persons to whom such disclosure has been made.

(3) (c) Disclosure otherwise prohibited by this rule of matter occurring before the Grand Jury may also be made-

(i) 1. When so directed by a court preliminary

2. Or in connenction with a judicial proceeding;

(ii) When permitted by a court at the request of the Defendant, upon a showing that grounds may exist for a motion to dismiss the indictment becuase of matters occurring before the Grand Jury.

6. Federal Rule of Criminal Procedure, Rule 11 (e)(6) - Inadmissibility of Pleas, Plea Discussions, and Related Statements:

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the Defendant who made the plea or was a participant in the plea discussions.

1. A plea of guilty which was later withdrawn;

2. A Plea of nolo contendere;

3. Any statements made in the course of any proceedings under this

rule regarding either of the foregoing pleas; or

4. Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn

However, such a statement is admissible:

(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions had been introduced and the statement ought in fairness by considered contemporaneously with it,

(ii) in a criminal proceeding for perjury or false statement if the statement was made by the Defendant under oath, on the record, and in the presence of counsel.

Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

82-1404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

EDWARD ROBERT NIGRO, JR.,

(Real Party In Interest), Petitioner

vs

UNITED STATES OF AMERICA,

Respondent.

APPENDIX I THROUGH IV

FOR PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN D. KAUFMANN
177 N. Church Avenue
1002 Transamerica Bldg.
Tucson, Arizona 85701
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Counsel for Petitioner

February 17, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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TABLE OF CONTENTS

	Page
Appendix 1 (Opinion of the Court of Appeals)	1
Appendix 2 (Memorandum Opinion and Order of the District Court)	19
Appendix 3 (Text of Statutes)	48
1. Fifth Amendment to the United States Constitution	48
2. 18 U.S.C. §6002 - Immunity	48
3. 28 U.S.C. §1826 - Recalcitrant Witness	49
4. 18 U.S.C. §3504 (a)(1) - Litigation concerning sources of evidence	50
5. Federal Rules of Criminal Procedure, Rule 6 (e)(2) and (3) - Rule of Secrecy and Exceptions	50
6. Federal Rules of Criminal Procedure, Rule 11 (e)(6) - Inadmissibility of Pleas, Plea Discussion, and Related Statements.	52
Appendix 4 (Order denying rehearing or rehearing en banc)	54

APPENDIX 1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re Grand Jury Proceeding) 82-2		
EDWARD ROBERT NIGRO, JR., (Real Party in Interest),	)	
Appellant,	)	NO. 82-2422
vs.	)	
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Appeal from the United States District Court for the District of Colorado (D.C. No. 82-Y-101)

John D. Kaufmann, Tucson, Arizona, for Appellant.

Gerald J. Rafferty, Assistant United States Attorney, Denver, Colorado (Robert N. Miller, United States Attorney Denver, Colorado, with him on the brief) for Appellee.

Before DOYLE, McKAY, and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

Appellant Edward Nigro seeks to reverse entry of a contempt citation by the District Court of the District of Colorado and seeks also remand with instructions that he be free to invoke his Fifth Amendment privilege against self-incrimination before the grand jury and to have it applicable to a matter which would incriminate him in foreign countries. Nigro assigns a number of grounds in support of his demand for relief. All were considered by the trial court except one, which is whether there should have been a hearing regarding facts which would mitigate the contempt sanctions. The grand jury which was investigating alleged violations of federal narcotics, customs and other laws, subpoenaed Nigro to appear before it and give testimony on July 27 and July 28, 1982. He did appear before the Grand Jury on the basis of issuance

of a Writ of Habeas Corpus. He refused, however, to testify. Instead he invoked his privilege against self-incrimination. Thereupon following a motion by the United States Attorney the trial court entered an order granting immunity pursuant to 18 U.S.C. §6002 and §6003. The court order dated July 28, 1982, is in part as follows:

> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against said witness in any criminal case, in any court except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

The questions which Mr. Nigro refused to answer had to do with illegal import and export of money between the United

States and foreign counrtries; illegal laundering of narcotics money inside and outside the territory of the United States; illegal laundering of narcotics money through offshore corporations or banks; and sources of money received from operation of narcotics operations. Nigro was called back before the grand jury and given another opportunity to answer questions, but he refused again to answer anything and thereupon the government moved that the trial court punish Nigro for his refusal to comply with the court order compelling his testimony pursuant to 28 U.S.C. §1826(a).

Thereupon Nigro sought to have the grand jury subpoena quashed on the basis that the court's immunity order would not extend to foreign prosecutions and, secondly, that it would not afford his protection co-extensive with his privilege against self-incrimination. He also

alleged procedural irregularities and directed other attacks against his incarceration.

On September 24, 1982 a hearing was held. A carefully written opinion was issued on November 17, 1982 by the trial court. It rejected all of the grounds Mr. Nigro asserted in his effort to justify his refusal to testify notwithstanding his grant of immunity.

The trial court gave no acceptance to the foreign prosecution point. The judge said: "Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and based on objective facts as distinguished from his subjective speculation." The court further found that Mr. Nigro showed insufficient connection between the areas of the grand jury's inquiry and potential

foreign prosecution for his testimony. Thus there was no evidence that if charges were filed in a foreign country, Nigro would be subject to extradition from the United States; there was insufficient evidence to believe that Nigro's testimony would be disclosed to a foreign government; and there was no showing of a risk that the evidence might incriminate Nigro in a foreign jurisdiction.

Also found by the trial court was that Nigro's claims were generally without merit. His motions for discovery were premature and contrary to Rule 6 (c) F.R.Cr.P. He was an immunity witness before the grand jury and was not a target in the proceedings. His contention that he could not comply with the order to testify because the government's questions were tainted by illegal electronic surveillance were rejected because the trial court found that only

valid consensual surveillance occurred and that the government would give the transcripts of those conversations to Mr. Nigro.

The further contention of Nigro was that some of the questions he was asked before the grand jury included information derived from plea discussions held in Tucson, Arizona about possible charges in Colorado conducted pursuant to Rule 11 (e)(6), F.R.Cr.P. These discussions did not result in any agreement and Nigro entered a guilty plea to the Arizona charges in the United States District Court for Arizona. The trial court ruled that since such a plea was entered Mr. Nigro's statements were available to the government under Rule 11 (e)(6)(D), F.R.Cr.P. Therefore, Mr. Nigro could not be excused from testifying before the grand jury on such a basis.

Also rejected by the trial court was Nigro's assertion that the grand jury proceedings had been tainted; this as a result of an Assistant United States Attorney, a court reporter and Nigro himself being present during the deliberations and voting of the grand jury. The "deliberations" were only a momentary consideration which occurred after the United States Attorney asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. The trial court viewed the taint as insignificant and only a technical violation of Rule 6 (d) F.R.Cr. P. Inasmuch as Nigro was an immunized witness he was not prejudiced in any event.

The trial court concluded that there was nothing in the record that precluded Nigro from testifying before

the grand jury and the trial court found him in civil contempt for his refusal to obey its lawful order. He is subject to being confined until he agrees to testify before the grand jury or until the particular grand jury is terminated. The time spent in jail by Nigro as a result of this contempt sentence is not to be credited to the sentences he is already serving.

Defendant has tendered numerous contentions. We do not deem it necessary to consider each and every one. These can be reduced to the following:

I

> That the District Court erred in that it violated 28 U.S.C. §1826 by not issuing an order to show cause, by failing to give adequate notice.

II

> That the trial court erred in determining that the Fifth Amendment (of the Constitution) is inapplicable to foreign prosecution and that the

appellant does not face a real and substantial fear of foreign prosecution.

A

That the Fifth Amendment applies to the threat of prosecution.

B

That the immunity granted was not co-extensive with the Fifth Amendment privilege against self-incrimination.

There is only one essential problem and we address ourselves to that. We consider in detail only one of appellant's contentions.

1. Adequacy of Safeguards for grand jury secrecy.

Mr. Nigro's Fifth Amendment arguments lose their importance if the emphasis is placed where it belongs, that is on the sufficiency of Rule 6 (e), F.R.Cr.P. That rule's guarantees of secrecy for Mr. Nigro's compelled disclosures are such that he has no reason to fear foreign prosecutions based on

his grand jury testimony. The trial court followed the majority of circuits when it concluded that "in view of the power and duty of this court to preserve the secrecy of grand jury matters, no 'real and substantial' danger of foreign prosecution exists based on his ordered testimony." This court can confidently affirm that rule.

The Supreme Court in Zicarelli v. New Jersey Investigation Comm'n., 406 U.S. 472, 378 set forth the standard that a witness must satisfy to invoke the privilege against self-incrimination. Applied to Mr. Nigro Zicarelli means he must show that his fears of foreign prosecution are real, and based upon objective facts; the Fifth Amendment privilege "protects against real dangers, not remote and speculative possibilities." Id. The majority of the circuits which have considered

whether an immunized witness is compelled to testify before a grand jury was adequately protected from leaks of his testimony to foreign authorities seeking to prosecute him, have held that grand jury proceedings are sufficiently secret to eliminate any reasonable concerns the witness may have as to foreign prosecution. In Re Baird, 668 F. 2d. 432, 434 (8th Cir.,) cert. denied 102 S. Ct. 2255 (1982); United States v. Brummit, 665 F. 2d. 521, 525-26 (5th Cir., 1981), cert. denied, 102 S. Ct. 2244 (1982); In Re Campbell, 628 F. 2d. 1260, 1262 (9th Cir., 1980); In Re Federal Grand Jury Witness (Lemieux) 597 F. 2d. 1166, 1167-68 (9th Cir., 1979); In Re Grand Jury Proceedings (Postal), 559 F. 2d. 234, 236-37, (5th Cir., 1977), cert. denied, 434 U.S. 1062 (1978); In Re Weir, 495 F. 2d. 879, 881 (5th Cir.) cert. denied, 419 U.S. 1038 (1974);

United States v. Armstrong, 476 F. 2d. 313, 316 (5th Cir., 1973); In Re Tierney, 465 F. 2d. 806, 812 (5th Cir., 1972), cert. denied, 410 U.S. 914 (1973).

This court has already affirmed the adequacy of Rule 6 (e), F.R.Cr.P. as a safeguard for the secrecy of immunized testimony before a grand jury where there was a threat of foreign prosecution alleged. In Re Parker, 411 F. 2d. 1067, 1070 (10th Cir., 1969), vacated as moot sub. nom. Parker v. United States, 397 U.S. 96 (1970). Our viewpoint on this has not changed.

The few courts which have expressed reservations about the secrecy of grand jury proceedings have pointed out a number of factors which suggest that such proceedings cannot be leakproof. The Second Circuit's recent decision, In Re Flanagan, No. 82-6058 (2nd Cir., Oct. 13, 1982), for instance makes the

following points:

1. Grand jurors or government agents might inadvertently leak testimony to reporters.

2. Other defendants can require disclosure of grand jury minutes containing exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963).

3. Defendants can also require trial witnesses to disclose their grand jury testimony regarding matters testified to on direct examination. 18 U.S.C. §3500 (e)(3).

4. Courts permit disclosure of grand jury minutes when they are relevant to a motion to dismiss an indictment, or raising a double jeopardy claim or challenging a search warrant, or concerning post-conviction proceedings.

5. Grand jury records can also be released for use in private litigation.

See Flanagan, supra, slip op. at 59-60, and the authorities cited therein. See also, In Re Federal Grand Jury Witness (Lemieux), 597 F. 2d. 1166, 1168-69 (9th Cir., 1979) (Hufstedler J., concurring); In Re Cardassi, 351 F. Supp. 1080 (D.C. Conn., 1972). The

suggestions do not rise above remote possibilities.

This court is not unaware of the hesitancy of a witness in Nigro's position even though Nigro is solely responsible for the difficulty of his position. He has violated the laws of several countries and must testify about those illegal activities before a grand jury if the trial court's order is affirmed. He must weigh the certainty of a contempt citation here against the likelihood of some day being prosecuted abroad should he be extradited or otherwise come within the jurisdiction of foreign laws he has broken. He has been, however, given immunity so he is not too bad off.

To protect him from the possibility of facing foreign prosecutions based on incriminating disclosures before the grand jury this court should affirm the

trial court's contempt citation, but return the case to that court with the following recommendations which will promote and support secrecy by adherence to Rule 6(e) in Mr. Nigro's case:

> 1. The District Court should require all participants in the grand jury proceedings to take an oath of secrecy regarding Mr. Nigro's testimony.
>
> 2. The transcripts of his immunized testimony should be sealed.
>
> 3. Future requests from disclosure should be reviewed in camera by the District Court which should zealously protect the immunity it conferred upon Mr. Nigro.

These measures are endored by the United States as appellee, see Appellee's Brief at 12-13, and this type of protection has found approval in other decisions; In Re Federal Grand Jury Witness (Lemieux), 597 F. 2d. 1166, 1167-68 (9th Cir., 1979); In Re Tierney, 465 F. 2d. 806, 812 (5th Cir., 1972),

cert. denied, 410 U.S. 914 (1973).

The affirmation of Parker above means it is unnecessary to consider whether Mr. Nigro showed a sufficient risk of foreign prosecution to entitle him to remain silent. The conclusion that Rule 6 (e), F.R.Cr.P, as bolstered by the recommendations above, will adequately protect the secrecy of Mr. Nigro's disclosures makes irrelevant an inquiry into the likelihood of the risks of foreign prosecutions he may face.

2. Grand Jury Proceedings and Civil Contempt Procedures.

Due to the constraints of 28 U.S.C. §1826 (b) which purports to require this court to decide this appeal within 30 days of its filing, it is imposible to address in this opinion each issue Mr. Nigro raises as fully as this court might do in less hurried circumstances.

The court has considered the positions presented in the briefs and oral arguments. We find no error in the trial court's conclusions of law expressed in its Memorandum Opinion and summarized above. It follows that the judgment of the District Court including the contempt citation against Mr. Nigro should be affirmed. It is so ordered. We do not consider the other contention based upon the Fifth Amendment. Our ruling renders this unnecessary.

END

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Misc. No: 82-Y-101

IN RE GRAND JURY PROCEEDING 82-2 (RELATING TO EDWARD ROBERT NIGRO, JR., Petitioner)	) MEMORANDUM OPINION AND ORDER

CHIEF JUDGE SHERMAN G. FINESILVER:

This matter is before the Court on two principal matters: (1) Petitioner's Motion to Quash Writ of Habeas Corpus Ad Prosequendum filed by Edward Robert Nigro, Jr., Petitioner; and (2) the government's Petition Pursuant to 28 U.S.C. §1826 (a) for a Rule to Show Cause why Mr. Nigro should not be held in contempt of court for failure to give testimony before a federal grand jury. Mr. Nigro was subpoenaed to appear before a federal grand jury in Colorado which was investigating alleged violations of federal narcotics, customs and other

laws.[1] On July 27 and 28, 1982, Mr. Nigro appeared before Grand Jury 82-2 pursuant to a Writ of Habeas Corpus. Mr. Nigro refused to testify invoking his privilege against self-incrimination. Thereafter, upon appropriate motion by the United States Attorney and supporting documents an order granting immunity was entered pursuant to 18 U.S.C. §6002 and §6003. The court order dated July 28, 1982 read in part as follows:

> NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. §6002:
>
> 1. That the witness Edward Robert Nigro give testimony or provide other information which he refuses to give or to provide on the basis of his

---

[1] Title 21 U.S.C. §841 (a)(1), §846 and §848; Title 18 U.S.C. §2; and Title 26 U.S.C. §7203 and §7206 (1).

Mr. Nigro refused to answer questions concerning illegal import and export of money between the United States and unnamed countries; illegal laundering of narcotics money inside and outside the territorial United States; illegal laundering of narcotics money through offshore corporations or banks; sources of money received from operation of narcotics operations.

privilege against self-incrimination as to all matters about which he may be interrogated before said grand jury;

2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against said witness in any criminal case, in any court, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

Mr. Nigro returned to the grand jury on the same date the immunity order was entered and refused to answer any questions. The Government moved the court for entry of sanctions against Mr. Nigro for his refusal to comply with the court order ordering his testimony [28 U.S.C. §1826 (a)].

Thereafter, Mr. Nigro through his counsel, moved to quash the grand jury subpoena alleging (a) that the court's immunity order would not safeguard him

from foreign prosecution and (b) it would not afford him protection co-extensive with his privilege against self-incrimination.

Mr. Nigro also asserted other grounds for not testifying, alleging procedural irregularities and other attacks directed against his incarceration. Motions that had been filed on his behalf include violations of Rule 6, F.R.Cr.P., abuse of process and others.

A hearing on the Motion was held on September 24, 1982, at which time Mr. Nigro set forth his reasons for denial of testimony.

I

The main issue involved is whether a witness who has been granted immunity against the use of his testimony in federal and state prosecutions may present possible foreign prosecution as a basis for his claim of self-incrimination

before a grand jury.

In the context of the factual backdrop of this case, we answer in the negative.

Neither at the hearings nor in the briefs has Mr. Nigro established that his fears of foreign prosecution are real, substantial and reasonable and based on objective facts as distinguished from his subjective speculation. Fifth Amendment "privilege protects against real dangers, not remote and speculative possibilities". Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478 (1972). The individual seeking to invoke the Fifth Amendment privilege against self-incrimination bears the heavy burden of establishing (1) that the subject of the government's questions raises "real danger", that the individual may be compelled to disclose information that might incriminate him

under foreign law and (2) that he legitimately entertains a "real and substantial" fear that his prosecution by a foreign government is likely to follow. United States v. Yanagita, 552 F. 2d. 940, 946 (2nd Cir., 1977).

Provisions of the constitution and Fifth Amendment apply only to restrain officials who act under the laws of the United States; they do not extend their protection to persons who are subject to prosecution by wholly unrelated governments abroad. In Re Parker, 411 F. 2d. 1067 (10th Cir., 1969) vacated as moot sub mon. Parker v. United States, 397 U.S. 96 (1970). In In Re Parker the trial court held a witness in civil contempt for refusing to answer grand jury questions. In a thorough and well reasoned opinion, the Appellate Court affirmed. The case remains strong precedent in this circuit.

In Re Parker, supra, holds (a) that the secrecy attending grand jury proceedings serves as a sufficient protection for an immunized witness that there is no real risk of foreign prosecution and (b) the witness cannot invoke her privilege against self-incrimination after receiving court immunization. Id, at 1069. In accord, Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972).

In In Re Parker the trial and Appellate Courts were directed to the body of law of a specific country (Canada) to determine whether there was a danger of incrimination under the law of that foreign country. In the instant case, Mr. Nigro in his broad claim of protection merely asserts that he may be subject to charges by some unnamed foreign jurisdiction. Clearly, his claim of privilege against prosecution is

speculative and lacks any specificity. In the stronger case of In Re Parker the claim of the immunized witness was disallowed.

We have considered and reject Mr. Nigro's argument that public disclosure of his grand jury testimony is inevitable and that when such disclosure occurs, various foreign jurisdictions will descend upon him. However, upon inquiry by the Court at the time of oral argument, counsel for Mr. Nigro was unable to cite a single case or present any legal precedent where foreign prosecutors sought extradition and prosecution of a grand jury witness on the basis of his immunized testimony.

Mr. Nigro is adequately protected by the provisions of Rule 6 (e), F.R. Cr.P. requiring that grand jury testimony be kept secret and this safeguard eliminates any reasonable ground for apprehending foreign prosecution. In

Re Parker, supra; In Re Baird, 668 F. 2d. 432, 434 (8th Cir., 1982), cert. denied, 102 S. Ct. 2255 (1982); United States v. Brummitt, 665 F. 2d. 521 (5th Cir., 1981), cert. denied, 102 S. Ct. 2244 (1982); In Re Campbell, 628 F. 2d. 1260 (9th Cir., 1980); In Re Tierney, 465 F. 2d. 806 (5th Cir., 1972), cert. denied, 410 U.S. 914 (1973). See discussion in In Re Flanagan, _____ F. 2d. ____ (2d Cir., 1982) slip opinion, October 13, 1982.

Another important factor is that the grant of immunity is as broad as possible under 18 U.S.C. §6002 and §6003; it is co-extensive with the self-incrimination privilege under the constitution and applicable law. Petitioner can expect no more. Under Rule 6 (e)(2)[2] government attorneys are not authorized to disclose grand jury testimony to

---

[2]See Appendix for excerpt of Rule 6, F.R.Cr.P.

foreign authorities without prior Court authorization. Although Rule 6 (e)(3)(a) permits disclosure to an attorney for the government "for use in the performance of such attorney's duty and to government personnel deemed necessary to assist an attorney for the government in enforcing federal criminal law" that exception does not allow federal law enforcement officials without first obtaining a court order under Rule 6 (e)(3)(c)(i). See, In Re Baird, supra, at 434 and United States v. Brummitt, supra, at 524.

Mr. Nigro's arugment ignores the fact that a court which has granted immunity to a grand jury witness who demonstrates a "real danger" that his compelled testimony could provide a basis for foreign prosecution would be unlikely to permit disclosure of grand jury testimony to foreign authorities.

As one court has observed:

> To infer that this court would on the one hand give defendant immunity, and on the other hand renege on its own integrity is so difficult to assume it is speculative. Only the court can give immunity; only the court can order the witness to answer; only the court can order disclosure.

See, United States v. Brummitt, supra, 525 n. 4; See also, In Re Tierney, supra; In Re Campbell, supra; and In Re Parker, supra.

If disclosure is requested by foreign authorities, or if disclosure is sought on other grounds at a later stage in the proceedings, appropriate steps can be taken to minimize any risk that immunized testimony would be disclosed in violation of a witness' constitutional rights. See Kastigar v. United States, 406 U.S. 441, reh. denied 408 U.S. 931 (1972).

Clearly in view of the power and duty of this Court to preserve the secrecy of grand jury matters, no "real and substantial" danger of foreign

prosecution exists based on his ordered testimony. Zicarelli v. New Jersey States Commission of Investigation, supra; In Re Parker, supra; and see special concurring opinion In Re Flanagan, supra, Slip Opinion October 13, 1982, page 62, 63.

In Re Flanagan, ____ F. 2d. ____ (2d Cir., 1982) (Slip opinion October 13, 1982) is the latest authority to uphold the requirement of testimony under grant of immunity notwithstanding a claim of potential foreign prosecution.

Flanagan was subpoenaed to testify before a grand jury investigating a conspiracy to smuggle fire arms and ammunition for the United States to the Irish Republic Army in Ireland, in violation of 26 U.S.C. §5861 and 22 U.S.C. §2778 (b)(2) and (c). He asserted his Fifth Amenment privilege

to refuse to testify on the grounds of self-incrimination. An order was entered pursuant to 18 U.S.C. §6002 and §6003, compelling him to "give testimony or provide other information . . . as to all matters about which he may be interrogated before the grand jury". Notwithstanding the immunity grant, Mr. Flanagan persisted in invoking the Fifth Amendment and refused to answer questions before the grand jury claiming that because the immunity order did not purport to protect him from prosecution in Ireland or the United Kingdom, it could not supplant his constitutional privilege against self-incrimination.

The circuit court reviewed current authorities and reversed the trial court's refusal to hold Mr. Flanagan in civil contempt for his refusal to testify before a grand jury under a

grant of immunity. The appeal's court held that interrogation before the grand jury would not violate his right to protection against self-incrimination since Flanagan failed to demonstrate any real or substantial fear of foreign prosecution as a result of his giving grand jury testimony. The Appellate Court did not decide the question whether, when immunity is granted a grand jury witness, the Fifth Amendment protects him against disclosure of information that would expose him to a substantial risk of foreign prosecution. Judge Van Graafeiland, in a special concurring opinion, held in effect that the spirit and tenor of Rule 6 (3) of the F.R.Cr.P. would afford the petitioner sufficient protection and that the "likelihood is that the tradition of grand jury secrecy, which is older than the Nation itself . . . will not be cavalierly disregarded."

There is another point urged in petitioner's argument. He contends that the existence of foreign narcotics laws and membership by many countries in a compact outlawing violations of said laws, legitimatizes his "real fear of prosecution:. In support, he cites the 1961 Multilateral Single Convention on Narcotics Law; 18 U.S.C. §1407. This statute must be read together with 26 U.S.C. §1739 (Amending Protocol). In our view this argument does not support petitioner's position.

A reading of the applicable statutes lead to the conclusion that the Single Convention and Amending Protocol require the member countries to the convention to be bound to observe the constitutional, legal and administrative systems of member nations. According to our analysis, this would include grants of

immunity.

In sum we find that there is no existence of potential foreign prosecution of Mr. Nigro; no nexus has been established between areas of inquiry of the grand jury and potential foreign prosecution for this testimony; there is no evidence that if charges were filed in a foreign country, Mr. Nigro would be subject to extradition from the United States; the likelihood that Mr. Nigro's testimony would be disclosed to a foreign government has not been extablished; and further the risk is not sufficiently substantial to justify a real fear that the evidence might incriminate Mr. Nigro in a foreign jurisdiction.

Mr. Nigro's refusal to testify on the grounds stated under the several motions is without support in fact or law.

The Court finds in favor of the government and against the claim of the Petitioner.[3]

II

The procedural arguments advanced by Mr. Nigro with regard to alleged abuses by the government simply do not provide a basis for non-compliance with the order to present testimony. No abuse has been demonstrated at this point. The request for discovery by Mr. Nigro ignores the fact that he is not a target in the grand jury proceedings. He is an immunized witness before the grand jury. If he should be indicted as a result of these proceedings, protections outlined in Kastigar v. United States, 406 U.S. 411 (1972), would be

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[3]We note that the point involved in this case has been a subject of several law reviews and legal publications as noted in the Appendix.

applicable. However, at this stage of the proceedings, these motions are at best premature and contrary to Rule 6 (e), F.R.Cr.P.

Mr. Nigro also contends that he could not comply with the order to testify because the government's questions are tainted by illegal electronic surveillance. The allegation is without any substantiation. On September 24, 1982, at the hearing on this matter, the government announced that it had conducted a search of its files and could find no illegal electronic surveillance of the witness. However, valid consensual surveillance did occur. The government has agreed to provide the transcripts of those conversations. In light of these facts, alleged electronic surveillance does not afford a basis to avoid our order of July 27, 1982.

While the government has responded, we do note Mr. Nigro has not made even a preliminary showing necessary to request the government to respond to his claim of illegal electronic surveillance. The claim and cursory information submitted by Mr. Nigro is such unsubstantial evidence that it placed no burden on the government to "affirm or deny" the existence of wire-tapping. See In Re Grand Jury (Vigil), 524 F. 2d. 209, 214 (10th Cir., 1975), cert. denied 425 U.S. 927 (1976).

However, assuming that the showing by Mr. Nigro was adequate to trigger a government response, the answer and denial by the government on this point was sufficient. The witness cannot avoid testimony on the grounds advanced. See Gelband v. United States, 408 U.S. 41, 71 (1972) (White, J. concurring) and United States v. Yanagita, 552 F. 2d.

940 (2d Cir., 1977).

III

Mr. Nigro also contends that some of the questions propounded to him before the grand jury include information derived from plea discussions held in Tucson, Arizona, among his attorney, two government prosecutors, and government agents from Colorado. It appears that during Mr. Nigro's plea discussions concerning the Arizona charges, he and his attorney attempted to resolve his status with regard to the investigation now pending before Grand Jury 82-2 by proffering some information to the Colorado agents in return for a commitment not to prosecute him. All parties now agree these discussions were conducted pursuant to Rule 11 (e)(6), F.R. Cr.P. After these discussions failed to result in any agreement, Mr. Nigro

proceeded to enter a guilty plea in the United States District Court for Arizona.

Rule 11 (e)(6)(D), F.R.Cr.P. is informative. Under that Rule, Mr. Nigro's statements to the prosecutors and agents in Arizona would be admissible in any civil or criminal proceeding once a plea of guilty was accepted and not withdrawn. Rule 11 (e)(6), F.R.Cr. P.; See also, 1C. Wright, Federal Practice and Procedure §11.8 (4) (1969). Since such a plea was entered, these statements are available to the government. Accord, United States v. Benson, 640 F. 2d. 136 (8th Cir., 1981). Therefore, this argument does not afford Mr. Nigro an excuse not to present testimony before the grand jury.

IV

Mr. Nigro also asserts that Grand

Jury 82-2 has been tainted and should be excluded from hearing any other matters concerning him. He alleges that Rule 6 (d), F.R.Cr.P. was violated, as Gerald J. Rafferty, Esq., an Assistant United States Attorney, a court reporter and Mr. Nigro himself were present during grand jury deliberations and voting. The incident occurred after Mr. Rafferty asked members of the grand jury whether they approved of his taking Mr. Nigro before the United States District Court to seek immunity and an order compelling him to testify. In our view such conduct amounted to only a technical violation of Rule 6 (d). In any event any taint in insignificant and does not justify Mr. Nigro's refusal to testify before Grand Jury 82-2. Mr. Nigro's rights have not been prejudiced by the incident. Mr. Nigro at this point in time is in the position

of an immunized witness.

V

Finally, Mr. Nigro has failed to support his Motion to Quash the Writ of Habeas Corpus for failure of the Department of Justice to follow its guidelines forbidding a target defendant to be called as a witness before the grand jury and his Motion to Quash the Writ for abuse of process. Contrary to his position, the government has not used the grand jury to punish or abuse Mr. Nigro. All Motions filed by Mr. Nigro are DENIED.

VI

The above constitute the findings of facts and conclusions of law.

VII

In light of the above discussions, the Court finds as follows:

1. Grand Jury 82-2 for the District of Colorado is conducting an

investigation involving possible violations of narcotics, currency and customs laws including Title 21 U.S.C. §841 (a)(1), 846 and 848; Title 18 U.S.C. §2; and Title 26 U.S.C. §7203 and 7206 (1).

2. On July 27, 1982, this Court directed Edward Robert Nigro, Jr. to provide testimony to the grand jury, pursuant to 18 U.S.C. §6002 and §6003 (a).

3. On July 28, 1982, Edward Robert Nigro, Jr. appeared before Grand Jury 82-2 and refused to provide said testimony on the basis of various grounds discussed above.

4. After careful review of the briefs and the applicable law we find Edward Robert Nigro, Jr. has no consttutional privlege or other justification for refusing to provide testimony to Grand Jury 82-2.

O R D E R

Edward Rober Nigro's Motion to Quash the Writ of Habeas Corpus and all Motions are hereby DENIED.

The Petition of the government pursuant to 28 U.S.C. §1826 (a) for a Rule to Show Cause is GRANTED.

It is adjudged that Edward Robert Nigro, Jr. is in civil contempt of this Court for his refusal to obey the lawful order of this court and give testimony or provide other information to the grand jury.

IT IS THEREFORE ORDERED that Edward Robert Nigro, Jr. be and is hereby committed to confinement until such time as Edward Robert Nigro, Jr. is willing to give such testimony or provide such information to the grand jury.

DATED this _____ day of November, 1982, in Denver, Colorado.

BY THE COURT:

SHERMAN G. FINESILVER
Chief Judge United
States District Court

RULE 6. The Grand Jury

2/

....

(e) Recording and Disclosure of Proceedings.

....

(2) General Rule of Secrecy.--A grand juror, an interpreter, a stenogrpaher, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than it deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the

performance of such attorney's futy to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performace of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

3/

Comment, Fear of Prosecution and the Fifth Amendment, 58 Iowa L.Rev. 1304

(1972). Note, Testimony Incriminating Under the Laws of Foreign Country -- Is there a Right to Remain Silent?, 11 N.Y. U. J. Internat. Law and Pol. 359 (1978); Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission; The Fifth Amendment Does Note Protect Federal Grand Jury Witnesses From Being Compelled to Give Testimony Which Would Incriminate Them in a Foreign Jurisdiction, 8 Tex. Int. L. J. 262 (1973); and Federal Witness Immunity Problems & Practice under 18 U.S.C. §6002-6007, 14 American Criminal Law Review 275, 288 (1976).

APPENDIX 3

1. Fifth Amendment to the United States Constitution:

   No person shall be held to answer for capital, or otherwise infamous crime, . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . . .

2. 18 U.S.C. §6002 - Immunity:

   Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillar to-

   1. A court or Grand Jury of the United States,

   2. An agency of the United States, or

   3. Either house of Congress, a joint committee of the two houses or committee or sub-committee of either house,

   and the person presiding over the proceeding communicates to the Witness an order issued under this party, the Witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except prosecution for perjury

giving a false statement, or otherwise failing to comply with the order.

3. 28 U.S.C. §1826 - Recalcitrant Witness:

A. Whenever a Witness in any proceeding before or ancillary to any court or Grand Jury of the United States refused without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document or record, recording or other material, the court, upon such refusal or when refusal is duly brought to its attention may summarily order his confinement at a suitable place until such time as the Witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-

1. The court proceeding, or

2. The term of the Grand Jury, including extensions, before which such refusal to comply with a court order occurred, but in no event shall such confinement exceed eighteen (18) months.

B. No person confined pursuant to subsection A of this section shall be admitted to bail pending the determination of any appeal taken by him from the order of his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as

soon as practical, but no later than thirty (30) days after the filing of said appeal.

4. 18 U.S.C. §3504 (a)(1) - Litigation concerning sources of evidence:

   A. In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States:

      1. Upon a claim by a party agreed that evidence is admissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

   B. As used in this section "unlawful act" means any act, the use of any electronic, mechanical, or other device (as defined by §2510 (5) of this Title) in violation of the constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

5. Federal Rules of Criminal Procedure, Rule 6 (e)(2) and (3) - Rule of Secrecy and Exceptions:

   (e) The Grand Jury - Disclosure of Proceeding.

   (2) A grand juror, an interpretor, stenographer, an operator of a

recording device, a typist who transcribed recorded testimony, an attorney for the government, or any person to whom disclosure is made under Paragraph 3 (a) (ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) (a) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberation and vote of a grand jury, may be made to-

(i) any attorney for the government for use in the performance of such attorney's duties;

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duties to enforce federal criminal law.

(3) (b) Any person to whom matters are disclosed under subparagraph (a)(ii) of this paragraph shall not utilize the grand jury material for any other purpose other than assisting the attorney for the government in the performance of such attorney's duties to enforce federal criminal law. An attorney for the

shall prompty provide the District Court, before which was enpaneled the Grand Jury whose material had been so disclosed with the names of the persons to whom such disclosure has been made.

(3) (c) Disclosure otherwise prohibited by this rule of matter occurring before the Grand Jury may also be made-

(i) 1. When so directed by a court preliminary

2. Or in connenction with a judicial proceeding;

(ii) When permitted by a court at the request of the Defendant, upon a showing that grounds may exist for a motion to dismiss the indictment becuase of matters occurring before the Grand Jury.

6. Federal Rule of Criminal Procedure, Rule 11 (e)(6) - Inadmissibility of Pleas, Plea Discussions, and Related Statements:

Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the Defendant who made the plea or was a participant in the plea discussions.

1. A plea of guilty which was later withdrawn;

2. A Plea of nolo contendere;

3. Any statements made in the course of any proceedings under this

rule regarding either of the foregoing pleas; or

4. Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn

However, such a statement is admissible:

(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions had been introduced and the statement ought in fairness by considered contemporaneously with it,

(ii) in a criminal proceeding for perjury or false statement if the statement was made by the Defendant under oath, on the record, and in the presence of counsel.

APPENDIX 4

NOVEMBER TERM - Janury 11, 1983

Before the Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James W. Barrett, Honorable William W. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
RE: EDWARD ROBERT NIGRO, JR., CIVIL CONTEMPT	)	
	)	No. 82-2422
EDWARD ROBERT NIGRO, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and

submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

Office-Supreme Court, U.S.
FILED
APR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1404

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD ROBERT NIGRO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, after being granted use immunity pursuant to 18 U.S.C. 6002 and 6003, petitioner could properly refuse to testify before a grand jury on the ground that his testimony might be used against him in a prosecution by a foreign government.

2. Whether petitioner could refuse to answer questions before a grand jury because some questions were derived from statements he had made during plea negotiations in a separate case.

3. Whether the government's statement that all electronic surveillance of petitioner had been consensual and its offer to provide petitioner with transcripts of all taped conversations was a sufficient response under 18 U.S.C. 3504(a)(1) to petitioner's assertion that questions might be derived from illegal surveillance.

4. Whether petitioner was given adequate notice and a reasonable opportunity to present his case at his contempt proceeding.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Baird, In re, 688 F.2d 432, cert. denied, No. 81-6541 (May 17, 1982) 4

Berry, In re, 521 F.2d 179, cert. denied, 423 U.S. 928 8-9

Campbell, In re, 628 F.2d 1260 4-5

Cardassi, In re, 351 F. Supp. 1080 4

Federal Grand Jury Witness, In re, 597 F.2d 1166 5

Gelbard v. *United States*, 408 U.S. 41 8

Grand Jury Proceedings, In re, 559 F.2d 234, cert. denied, 434 U.S. 1062 5

Grand Jury Subpoena of Flanagan, In re, 691 F.2d 116 6

Illinois v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983) 5

Korman v. *United States*, 486 F.2d 926 9

Parker, In re, 411 F.2d 1067, vacated as moot, 397 U.S. 96 4

Page

Cases—Continued:

Quinn, In re, 525 F.2d 222 9

Tierney, In re, 465 F.2d 806, cert. denied, 460 U.S. 914 5

United States v. *Aloi*, 511 F.2d 585, cert. denied, 423 U.S. 1015 9

United States v. *Armstrong*, 476 F.2d 313 5

United States v. *Benson*, 640 F.2d 136 7

United States v. *Brummitt*, 665 F.2d 521, cert. denied, No. 81-1877 (May 17, 1982) 4

United States v. *Caceras*, 440 U.S. 741 8

United States v. *D'Andrea*, 495 F.2d 1170, cert. denied, 419 U.S. 855 9

United States v. *Ocanas*, 628 F.2d 353, cert. denied, 451 U.S. 984 7

United States v. *Stevens*, 510 F.2d 1101 9

United States v. *Williams*, 580 F.2d 578, cert. denied, 439 U.S. 832 8

Weir, In re, 495 F.2d 879, cert. denied, 419 U.S. 1038 5

Zicarelli v. *New Jersey State Commission*, 406 U.S. 472 ..... 4, 6

Constitution, statutes and rules:

U.S. Const. Amend. V 4

18 U.S.C. 2511(1)(c) 8

18 U.S.C. 2511(1)(d) 8

18 U.S.C. 3504(a)(1) 8

Page

Constitution, statutes and rules—Continued:

18 U.S.C. 3504(b) 8
18 U.S.C. 6002 2
18 U.S.C. 6003 2
28 U.S.C. 1826(a) 2
28 U.S.C. 1826(b) 3
Fed. R. Crim. P. :
Rule 6(e) 3, 4, 5, 6
Rule 6(e)(2) 4, 5
Rule 6(e)(3)(A) 5
Rule 6(e)(3)(C) 5
Rule 11(e)(6)(D) 3, 7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is not yet reported. The opinion of the district court (Pet. App. 19-47) is reported at 555 F. Supp. 65.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1982. A petition for rehearing was denied (Pet. App. 54-55) on January 11, 1983. The petition for a writ of certiorari was filed on February 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury in the United States District Court for the District of Colorado, which was investigating alleged violations of federal narcotics, customs and other laws, subpoenaed petitioner, who was then an inmate in the

federal correctional facility in Talladega, Alabama serving a sentence for narcotics violations, to appear before it (Pet. App. 2). On July 27 and 28, 1982, petitioner appeared before the grand jury, but refused to testify fully; instead he invoked his privilege against self-incrimination (*id.* at 3). Specifically, petitioner refused to answer any questions concerning the illegal transportation of money between the United States and other unnamed countries, the illegal laundering of narcotics money inside and outside the United States, the illegal laundering of narcotics money through offshore corporations and banks, or any sources of money he received from narcotics trafficking (*id.* at 3-4).

On July 28, 1982, the district court, on motion of the government, granted petitioner immunity pursuant to 18 U.S.C. 6002 and 6003, and ordered him to testify (Pet. App. 3). Petitioner was called back before the grand jury but refused to answer any questions (*ibid.*).

The government moved the district court for entry of sanctions against petitioner under 28 U.S.C. 1826(a) for his refusal to comply with the court order compelling his testimony before the grand jury (Pet. App. 4). Petitioner then cross-moved the district court to quash the grand jury subpoena on the grounds, *inter alia*, that the court's immunity order would not extend to a foreign prosecution and thus would not afford him protection co-extensive with his privilege against self-incrimination; that the questions were improperly based on statements he made during plea discussions in an unrelated prosecution in Arizona; and that questions were improperly derived from unlawful electronic surveillance.

After a hearing on the cross-motions the court refused to quash the subpoena, adjudged petitioner in civil contempt, and ordered him confined to prison until such time as he was willing to testify before the grand jury (Pet. App. 19-47). The court found that petitioner had failed to make a

concrete showing that his fear of foreign prosecution was anything more than sheer speculation (Pet. App. 25-26). Moreover, the court held that the secrecy provisions in Fed. R. Crim. P. 6(e) provided sufficient safeguards against disclosure to a foreign government to eliminate any " 'real danger' " that petitioner's testimony would be used in a foreign prosecution (Pet. App. 26-30). With regard to the alleged illegal wiretaps, the court found first that petitioner's claim was so cursory that the government was not even obligated to respond to it but that, in any event, the government had responded fully by representing that a search of its files revealed that the only surveillance had been consensual and that transcripts of those tapes were available to petitioner (Pet. App. 36-37). Finally, the court held that petitioner's statements during discussions regarding a possible plea to narcotics charges in Arizona could properly be used by the government under Fed. R. Crim. P. 11(e)(6)(D), because petitioner had pled guilty to those charges (Pet. App. 38-39).

2. The court of appeals affirmed (Pet. App. 1-18). Because of the time constraints in 28 U.S.C. 1826(b), the court of appeals discussed only the risk of foreign prosecution issue, but noted that it affirmed on all other issues (Pet. App. 18). On the self-incrimination issue it held that under Rule 6(e) grand jury proceedings were sufficiently secret that petitioner could have no reasonable concern about a foreign government's obtaining any of his testimony and using it against him (Pet. App. 11-13). As an additional precaution, however, the court of appeals remanded with a recommendation that, in order to minimize the likelihood of any improper disclosures, the district court should require all participants in the grand jury to take an oath of secrecy, should seal the transcripts of the immunized testimony and should review *in camera* all future requests for the testimony in order to protect petitioner (Pet. App. 16).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that his refusal to testify was justified, despite the grant of immunity, because of the danger that his testimony would be used against him in a foreign prosecution. Even assuming that the Fifth Amendment's protections extend to foreign prosecutions at all,[1] both courts below properly rejected petitioner's claim on the ground that there was no substantial likelihood of foreign prosecution based on petitioner's grand jury testimony.

This Court in *Zicarelli* v. *New Jersey State Commission*, 406 U.S. 472, 478 (1972) (footnote omitted), held that the privilege against self-incrimination protects "real dangers, not remote and speculative possibilities." In applying this standard to immunized grand jury testimony, most courts of appeals, like the court of appeals in this case, have held that the secrecy provisions of Fed. R. Crim. P. 6(e)[2] are sufficient to protect an immunized witness against any realistic danger of use of his testimony in a foreign prosecution. See *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982), cert. denied, No. 81-6541 (May 17, 1982); *United States* v. *Brummitt*, 665 F.2d 521, 525-526 (5th Cir. 1981), cert. denied, No. 81-1877 (May 17, 1982); *In re Campbell*, 628

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[1]See *Zicarelli* v. *New Jersey State Commission*, 406 U.S. 472, 478-479 (1972). Compare *In re Cardassi*, 351 F. Supp. 1080, 1084-1086 (D. Conn. 1972), with *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970).

[2]Fed. R. Crim. P. 6(e)(2) provides in pertinent part:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. * * * A knowing violation of Rule 6 may be punished as a contempt of court.

F.2d 1260, 1262 (9th Cir. 1980); *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1167-1168 (9th Cir. 1979); *In re Grand Jury Proceedings*, 559 F.2d 234, 236-237 (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); *United States* v. *Armstrong*, 476 F.2d 313, 316 (5th Cir. 1973); *In re Tierney*, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 460 U.S. 914 (1973).

These decisions are plainly correct. Fed. R. Crim. P. 6(e)(2) broadly prohibits disclosure of matters occurring before the grand jury under penalty of contempt. Thus, although Fed. R. Crim P. 6(e)(3)(A) authorizes disclosure of grand jury material to a government attorney for use in the performance of his duty and to government personnel deemed necessary to assist a government attorney in enforcing federal criminal law, the persons to whom the material is disclosed are prohibited under penalty of contempt from using it for any other purpose. All other disclosures require the court's permission. Fed. R. Crim. P. 6(e)(3)(C). See *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983). It is most unlikely that the district court, having compelled petitioner to testify under a grant of immunity, would then permit disclosure of his testimony in a way that would undermine the immunity. See *In re Tierney*, *supra*, 465 F.2d at 811.[3]

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[3]Moreover, the court of appeals in this case has provided even greater protection for petitioner by recommending precautions beyond those required by Fed. R. Crim. P. 6(e) (see page 3, *supra*). For their part, the government attorneys below endorsed these measures and represented that they would not disclose petitioner's testimony to anyone without authorization from the court (Appellee's Brief at 13). The additional safeguards ordered by the court of appeals eliminate whatever minimal risk existed that petitioner's testimony would be used against him in a foreign prosecution. See *In re Federal Grand Jury Witness*, *supra*, 597 F.2d at 1167-1168; *In re Tierney*, *supra*, 465 F.2d at 812.

Petitioner argues (Pet. 14-16), however, that there is a conflict between the decision below and the Second Circuit's decision in *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116 (1982). In *Flanagan*, the court of appeals held that a witness could not properly refuse to answer questions on the ground that his testimony might lead to foreign prosecution because the witness had failed to show any substantial likelihood that any foreign government would attempt to prosecute him. In dictum, however, the majority expressed the view that Fed. R. Crim. P. 6(e) does not, by itself, eliminate the self-incrimination issue because the Rule does not sufficiently protect against the risk that a witness' testimony before a grand jury might be used in a foreign prosecution. 691 F.2d at 125. The court's discussion of Rule 6(e) was not necessary to its decision; moreover, the Second Circuit had no reason to consider the special precautions adopted by the court of appeals in this case to protect the witness' testimony. Finally, in light of the finding of the district court that petitioner did not make any concrete showing that his fear of prosecution was based on more than speculation, it is plain that the Second Circuit would also have decided that petitioner was required to testify before the grand jury.[4]

2. In the course of negotiating a plea agreement in connection with the Arizona charges, petitioner and his attorney sought to resolve petitioner's status with regard to the Colorado grand jury investigation in this case by proffering certain information to federal agents who took part in the Arizona plea negotiations (Pet. App. 38-39). After petitioner failed to reach an agreement with the Colorado agents, he pled guilty to the Arizona charges.

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[4]As in *Zicarelli, supra*, petitioner's failure to demonstrate any real danger of a foreign prosecution pretermits the need to consider petitioner's additional contention (Pet. 16-17) that his privilege against self-incrimination extends to a prosecution by another county.

Petitioner contends (Pet. 20-21) that some of the questions the government asked him before the grand jury were improperly derived from statements he had made during plea discussions in connection with narcotics charges against him in Arizona and that he was therefore not required to answer them. In this regard, petitioner relies solely on Fed. R. Crim. P. 11(e)(6)(D), which provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" are not admissible against the defendant in any subsequent proceeding. Petitioner's claim is without merit.

Fed. R. Crim. P. 11(e)(6)(D) by its terms makes "statement[s] made in the course of plea discussions" privileged only if no guilty plea is entered or the plea is later withdrawn. Here, petitioner's statements were made in the course of plea discussions that led to a plea of guilty to the only charges that were pending. Since that guilty plea has not been withdrawn, his statements are not privileged under Fed. R. Crim P. 11(e)(6)(D), and they could be used by the government as a basis for its grand jury inquiry. See *United States* v. *Benson*, 640 F.2d 136, 138 (8th Cir. 1981).[5]

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[5]Moreover, Fed. R. Crim. P. 11(e)(6)(D) does not bar the use of "statement[s] made in the course of plea discussions" at grand jury proceedings. The rule expressly states that such statements are not admissible "*against* the defendant" (emphasis added) in any civil or criminal proceeding. Since a grand jury proceeding is an *ex parte* investigation to determine whether a crime has been committed and whether criminal charges should be instituted against any individual, it is not an adversary proceeding within the meaning of Fed. R. Crim. P. 11(e)(6)(D). See *United States* v. *Ocanas*, 628 F.2d 353, 357 n.1 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981). And since petitioner's grand jury testimony is immunized, there is no risk of its being used against him hereafter.

3. Petitioner argues (Pet. 22-23) that he should not have been required to testify before the grand jury because the government's questions were tainted by illegal electronic surveillance. See *Gelbard* v. *United States*, 408 U.S. 41 (1972). At the hearing on this matter, the Assistant United States Attorney announced pursuant to 18 U.S.C. 3504(a)(1)[6] that the government had conducted a thorough search of its files and determined that there had been no electronic surveillance of petitioner of a kind that would require advance judicial authorization (Pet. App. 36). Rather, the records showed that only consensual surveillance had occurred (*ibid.*).[7] Petitioner contends (Pet. 23) that the government's statement was insufficient under 18 U.S.C. 3504(a)(1), both because it was not presented by affidavit and because it was not based upon "first hand inquiry." This contention is without merit.

18 U.S.C. 3504(a)(1) requires only that the government affirm or deny the occurrence of electronic surveillance and does not specify that the denial be made by affidavit. The courts of appeals have routinely accepted unsworn government statements, both oral and written, as to whether electronic surveillance had occurred. See, *e.g.*, *United States* v. *Williams*, 580 F.2d 578, 585 n.38 (D.C. Cir.), cert. denied, 439 U.S. 832 (1978); *In re Berry*, 521 F.2d 179, 185 (10th

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[6]18 U.S.C. 3504(a)(1) provides that "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act." Under 18 U.S.C. 3504(b) an "unlawful act" includes the use of any electronic device in violation of the Constitution or laws of the United States.

[7]This Court has upheld consensual monitoring of oral communications as constitutional (see *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979)), and such monitoring is expressly authorized by federal statute. 18 U.S.C. 2511(1)(c) and (d).

Cir.), cert. denied, 423 U.S. 928 (1975); *United States* v. *Aloi*, 511 F.2d 585, 602 (2d Cir.), cert. denied, 423 U.S. 1015 (1975); *United States* v. *Stevens*, 510 F.2d 1101, 1104-1106 (5th Cir. 1975); *United States* v. *D'Andrea*, 495 F.2d 1170, 1174 n.12 (3d Cir.), cert. denied, 419 U.S. 855 (1974).[8]

Nor is there any substance to petitioner's contention (Pet. 23) that the government's denial was insufficient because it was not based upon "first hand inquiry." None of the cases upon which petitioner relies suggests that a government denial of electronic surveillance is insufficient where, as here, the attorney in charge of the case for the government canvasses all relevant agencies and then represents that the agencies did not conduct electronic surveillance of the defendant; indeed, the court in *In re Quinn*, 525 F.2d 222, 226 (1st Cir. 1975), one of the cases cited by petitioner, expressly approved such a procedure.

4. Finally, petitioner contends (Pet. 17-20) that he was deprived of due process at the hearing on his motion to quash because he was given only two days notice, the court failed to indicate that one of the purposes for the hearing was to determine whether petitioner should be held in contempt and he was afforded an insufficient amount of time at the hearing to present his case. The hearing record does not show, however, that petitioner objected to the sufficiency of the notice of the contempt proceeding in the district court or that he sought a continuance in order to prepare for the hearing or additional time in which to

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[8]Only the Seventh Circuit requires the government to respond by affidavit to allegations of unlawful electronic surveillance. See *Korman* v. *United States*, 486 F.2d 926, 931 (7th Cir. 1973). But there is no reason for this Court to consider whether the government's response ordinarily must be by affidavit where a serious claim of illegal surveillance is made, because, as the district court held (Pet. App. 37), petitioner's claim of illegality was so insubstantial on its face that it did not even require a response.

present his case. Nor, in light of the full briefing that preceded the district court's disposition of the case, could petitioner reasonably complain that his rights were violated by the way the hearing was conducted.[9] Accordingly, petitioner's due process claim must fail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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[9]Indeed, petitioner took the stand at the hearing and testified at length (Tr. 18-26).

DOJ-1983-04